Jus Appellandi AD REGEM Ipsum A' CANCELLARIA:

OR,

A Manifestation of the *King's* Part and Power to Relieve His Subjects against *Erroneous* and *Unjust Decrees* in CHANCERY.

Collected out of the Authorities of Law.

By WALTER WILLIAMS *of the* Middle-Temple, *Esq;*

Rex Sapiens Judicabit Populum suum, Bract. l. 3. 107.

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TO THE
High and Mighty MONARCH,
CHARLES II.
By the Grace of GOD
KING of *Great-Britain*, &c.

Moſt Gracious Sovereign,

HAving ſpent many years in the ſtudy of your Majeſty's Laws, and conceaving that ſeveral for whom I was concern'd as Councel had been much wrong'd a while ſince by Decrees in *Chancery*, and finding that they were paſt hopes of being Righted There, I adviſ'd Petitions to be preferred to Your Majeſty, *the Fountain of Juſtice*, thereby beſeeching Your Majeſty to relieve Your Petitioners, either by rehearing the matter in Your Royal Perſon, or by referring it to ſuch fit perſons as Your Majeſty ſhould nominate: whereupon it was declared by ſome near Your Majeſty, *That Your Majeſty could not legally grant your Petitioners Requeſt; and that no Relief could be had againſt* Chancery-Decrees *but by the Houſe of Lords aſſembled in Parliament*; which thing I ap-

prehended to be a great mistake, and tended (as I conceiv'd) to the Outing of Your Majesty of that Just and Necessary Jurisdiction, Preheminence, and Authority which is united and annexed to your Imperial Crown, and which to assist and defend to my Power I am bound by Oath: In discharge whereof I have made diligent search for what evidence could be found in the Authorities of Law to make out Your Majesties just Title to the premisses, and what I have found I have made a methodical Collection of, being, I hope, sufficient for the purpose; whereunto I have also added some instances of the great mischief it is to your Subjects, and may be to Your self, your Crown and Dignity, that Your Majesties Power in that matter is not put in practice. All which I humbly lay at Your Majesties Feet, begging Your Majesties acceptance and consideration thereof, as it is the product of the unfeigned Fidelity and Allegiance of

Dread SIR,

Your Majesties most Faithful and Obedient Subject,

WA. WILLIAMS.

To His Majesties most Honourable

PRIVY-COUNCIL.

Great Sirs,

NExt to His Sa-cred Majesty, to [a] You all Honour and Reverence is due, as being Incorporate to His Person, and Whose [b] High Office it is, according to the best of your Judgments to uly and justly to advise and counsel the King in all things that may be to His Honour and Behoof, and for the good of His Subjects. And though His Majesty is arm'd with several other Councels for several purposes, yet it is with You that he consults and advises (amongst other the most weighty Affairs of State) when, and upon what occasion it is that He is to call to His other Councels for Advice and Assistance. It appears by the Writs of Summons of the Lords to Parliament, and by the Writs to the Sheriffs for Election of Knights and Burgesses, that it is by Your advice the King doth call His Parliament; for after the Salutem in those Writs are these words,

[a] C. 4. Inst. 53; Crompt. Juris. 35.

[b] C. 4. Inst. 54;

Cromp. Ju. fo. 1.

words, viz. Quia de Adviſamento & Aſſenſu Concilii noſtri pro quibuſdam arduis & urgentibus negotiis nos ſtatum & defenſionem Regni noſtri *Angliæ*, & Eccleſiæ *Anglicanæ* concernentibus, quodam Parliamentum noſtrum, apud, *&c.* teneri ordinavimus. *If then it appertains to You to adviſe His Majeſty when it is proper to call His Parliament, it follows of conſequence that it appertains to You alſo to adviſe Him to call His other Councels upon occaſion: And* hence *I conceive it is that You have been Dignified in ancient Records by the name of* Magnum Concilium Regis, *and thereby diſtingniſhed from* Magnum Concilium Regni, *which is the* Parliament. *Therefore, and in as much as frequent ſupplications have of late been made by divers to His Majeſty for Relief againſt miſtaken Decrees in* Chancery *without effect, by reaſon of ſome Opinions that there was no legal Remedy in ſuch Caſes, but by* Appeal *to the Lords Houſe aſſembled in Parliament: I have, for the advancement of Juſtice, and maintenance of the King's Right of Juriſdiction, compil'd, and adventured humbly to recommend this enſuing Treatiſe to His Majeſty and Your conſideration; which if You vouchſafe to peruſe, I hope*

Co. 1 *Inſt.* 110. cites Records to that purpoſe.

hope it will make it ſo clear that His Majeſty may lawfully relieve His Subjects againſt ſuch miſtaken Decrees in the Intervals of Parliament, *as to confute all Opponents, or at leaſtwiſe maniſeſt ſo much probability thereof, and that there is ſo much neceſſity for the uſe of it, as may induce You to adviſe and deſire His Majeſty to be further ſatisfied therein by the Opinion of His whole Colledge of Judges, who in caſe of doubt in matters of Law, our Law-Books ſay,* are his particular and ſworn Councel; *In doing whereof, I humbly conceive you will perform an act that will highly redound to the Honour of the King, & welfare of His injur'd Subjects: my Zeal to* Both *which hath put me upon begging Your favourable Reception and Interpretation of this Labour of His, who ſubmits both* Himſelf *and* It *to Your Honours Command.*

Co. 1 *Inſt.* 110. *vi.* Jurament. Inſticiarior. 18 *E.* 3.

W. W.

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Jus

Jus Appellandi
AD
REGEM
Ipſum à
Cancellaria.

SECT. I.

Of the mutual Obligation upon King *and* People, *in reference to Government.*

WHoſoever will but conſider it, may eaſily diſcern, that there is a mutual benefit accrues by *Government*, as well to the *People* as to the *King*; the end & deſign of it being the protection of

Both from wrong and violence: And to the end this may be the better accompliſh'd, both are mutually bound in *England* to act their part therein: The *King* is bound *to govern by Law*, and the *People* moſt of the conſiderable part of them are bound, and all of them are compellable to be bound *to aſſiſt and defend all Juriſdictions, Priviledges, Prehemineuces and Authorities, granted or belonging to the King, His Heirs and Succeſſors, or united or annex'd to the Imperial Crown of this Realm*; the King by the very Conſtitution of his *Kingly Office*, and by his *Coronation-Oath*; and the *People* both by their *Natural Allegiance*, and by force of the Statute 1 *Eliz.* cap. 10. It is not a ſlight and mean tie that they are bound by, it is by a ſacred and ſolemn Oath, the greateſt obligation upon Earth, and the firmeſt bond of *Humane Society*; which whoſoever voluntarily breaks, either by a wilful *acting againſt*, or by a careleſs *neglecting to perform*, what

what he hath undertaken by it, I'll be bold to ſay, He is fit Company for none on this ſide Hell, unleſs for ſome *perjur'd Aldermen*, or *falſe Ignoramus-Jury-men.*

Being thus engag'd, I think it highly concerns us all to diſcharge our Duty therein; and to that end it is neceſſary, in the firſt place, to underſtand what *Juriſdictions*, *Prehemineucies*, *Priviledges* and *Authorities* do appertain to the *King*; for without That, the King cannot *exercise* His *Juriſdiction*, nor the People *aſſiſt* Him in it: And in as much as the *King's Juriſdiction* over His *Court of Chancery* is now doubted of by many, diſ-own'd by ſome, and by others thought not neceſſary to be put in execution; I therefore ſet my ſelf upon enquiry after the King's Part and Power in that particular, having had experience of the inconveniencies the want of the uſe of it produceth.

Sect. II.

What *is* Juriſdiction; *to* Whom *it appertains*; *and* How *anciently exerciſed in this Kingdom.*

JURISDICTION, in the bare literal ſence and ſignification of the word, and *ex vi termini*, imports no more than Dire Droit, or *Jus dicere*, a Power to pronounce, interpret or relate what is Law and Right, in any matter of Controverſie: But as neceſſary appendants thereunto, there are many Priviledges and Authorities needful, to make up a full and plenary Power to adminiſter Juſtice, which are generally comprehended within the meaning of *Juriſdiction*; As, *firſt*, an Authority to *Command* the party or parties complain'd againſt, before Him that hath Juriſdiction: *Secondly*, to *Examine* the

the truth of the complaint, and to *hear* the Defendants defence: *Thirdly*, to *give Judgment* according to what the Law is: *Fourthly*, to *compel* Obedience to, and Performance of that Judgment which is done either by Impriſonment of the perſon until he perform, or by ſeizing his Eſtate, or part of it, in ſatisfaction of the Judgment, which is the *Coercive Power* of the Law, without which the reſt ſignifies but little.

The right of *Juriſdiction* is a prize for which great Conteſts have been for many Ages in this Kingdom: the *Pope* for a long time ſtrugl'd with our Kings for *Juriſdiction* in *Eccleſiaſtical* matters; ſome yielded to him, and ſome would not; The *Houſe of Commons* have often ſtrove with the *Houſe of Lords* for *Juriſdiction*; the King's *Courts of Juſtice* have often contended with one another for *Juriſdiction*; and now ſome would have it, that the King's own more immediate *Court*, his *High-*

Court of Conscience, would be so highly unconscionable, as to out Him from having any thing to do there.

To find out the true Proprietors of *Jurisdiction*, for which there hath been so many pitch'd Battles fought, it is necessary to look a great way back, *Origo rei inspici debet*, the beginning must be consider'd, Deut. 32. 7. *Remember the days of old, consider the years of many Generations; ask thy Father, and he will shew thee; thy Elders, and they will tell thee.* After this manner will I make my Enquiry; for I know no *Statute of Limitation* in the case to bar the King by non-claim; but there is a Maxim in Law which imports the contrary, *Quod nullum tempus occurrit Regi*; and therefore what I find in old Authors as well as new, I will truly relate.

Bodin. l. 4. cap. 6. By the Opinion of all ancient & wise Politicians and Historians, (says *Bodin*) *Justitiæ fundæ causa Reges esse creatos*; Kings

Kings were ordain'd for no other end, than for administration of Justice, which is a full Authority that Jurisdiction appertained to *Kings*, even by their Constitution; and the same Author says, That anciently the Kings of most Nations and Countreys were called *Judges*, and they thought no other Appellation or Title more honourable than That, and they delighted in nothing more then a personal, not only virtual, but actual, determining of their Subjects Controversies.

Moses for a great while Ex. 18. spent the greatest part, or much of his time, sometimes even from morning until evening, in hearing and determining Controversies between the people; But at length, finding that as the people encreased in number, so did Suits, insomuch that it was too hard a task for him to dispatch all himself, he therefore chose men of courage out of all *Israel*, and *those he made Heads over the people*,

Rulers over Thousands and over Hundreds, over Fifties and over Tens, who judged the people at all seasons: but the hard causes (matters of difficulty) *they brought to* Moses *himself to determine*; none of them pretending that because *Moses* had given them full power to judge the people within their several Provinces, that he had excluded himself from power of judging there, and examining whether or no their Judgments were right and just.

Cook 1 Inst. f. 168. In imitation of *Moses*, or after the same manner, did the ancient Kings of *England* divide this Kingdom, first into *Counties*, and *Counties* into *Hundreds*, *Hundreds* into *Manors*, and *Manors* into *Townships* and *Villages*, and appointed Jurisdictions in every Division.

Cow. Int. Title Bract. In or about the time of *H.* 3. one *Henry de Bracton*, a learned Judge, finding that the Laws and Customs of the Realm,

Realm, (which at that time were not reduc'd into writing) were oftentimes abus'd by unlearned men, *Qui Cathedram judicandi ascendunt antequam leges dedicerent*, who became Judges before they had been Students, and consequently determined Causes rather after their own fancies than the Rules of Law: he therefore resolv'd, *ad vetera Judicia Justorum perscrutenda diligenter*, to make diligent enquiry into the ancient Judgments and Resolutions of just Judges, and to put the same in writing for the benefit of Posterity, as himself says in the first page of his Book *Of the Laws and Customs of* England; and therein as to the Temporal state of affairs, (the *Pope* having in those days usurp'd Jurisdiction, not only upon our *Kings*, but upon many other Princes in Spiritual matters) *Bracton* says, That under Emperours, Kings and Princes, are Dukes, Earls and Barons, great Officers, *Bract.* l. 1. fo. 5. cap. 8.

cers, men of Renown, and Knights; there are alſo Freemen and Bondmen, and divers Authorities and Powers conſtituted under the King; *Omnia quidem ſub eo, & ipſe ſub nullo, niſi tantum ſub Deo, parem autem non habet in regno ſuo quia ſic amitteret præceptum, cum par in parem non habet Imperium; item nec multo fortius ſuperiorem nec potentiorem habere debet, quia ſic erit inferior ſuis ſubjectis & inferiores paret eſſe non poſſunt potentioribus ipſe autem Rex non debet eſſe ſub homine ſed ſub Deo & Lege, quia Lex facit Regem, attribuat igitur Rex Legi, quod Lex attribuat ei, videlicet Dominationem & Poteſtatem,* And a little further, *Et ſciendum quod ipſe Dominus Rex Ordinariam habet Juriſdictionem & Dignitatem & Poteſtatem, ſuper omnes qui in regno ſuo ſunt habet enim omnia Jura in manu ſua quæ ad Coronam & Laicalem pertinet poteſtatem & materialem gladium qui pertinet ad regni Gubernaculum, habet etiam Juſtitiam & Judicium*

dicium quæ sunt Jurisdictiones ut ex Jurisdictione sua sicut Dei Minister & Vicarius tribuat unicuiq; quod suum fuerit.

To the like effect he says in another place, treating of Temporal Jurisdiction, and Who it is that can and ought to judge, he says,

That it is the *King*, and no other, ought to judge, *Bract.* lib. 3. fo. 107.

if He alone could compass it, being thereunto obliged by tenor of his Oath; for at his Coronation he ought in the name of Jesus Christ, upon Oath, to promise these Three things to his people that are subject to himself, 1. *That he would command, and use his utmost endeavour, that perfect peace be continued to the Church of God, and all Christian people, during all his time.* Secondly, *That he would earnestly and strictly forbid and interdict all Pillaging, Extortion, Ravening, and Wickedness whatsoever.* Thirdly, *That in all Judgments he would regard Equity and Mercy, that he*

he might receive Mercy from God, and that all people by his Justice may enjoy a firm and inviolable Peace.

He says further, that it is the Kings part and duty (he being Gods Vicegerent on Earth) to prefer right before wrong, Equity before iniquity, that all his Subjects might live honestly, that none of them hurt the other, and that every one of them may have and enjoy what to him of right belongs. He ought to exceed all his Subjects in Power; He ought to have no Equal, much more ought he not to have any Superiour, especially in administration of Justice, that it may be truly said of him, *Magnus Dominus noster, & magna virtus ejus*, with a great deal more to the same effect.

In the next chapter he proceeds, and says, *Dictum est in proximo de ordinaria Jurisdictione quæ pertinet ad Regem*, &c.

Bract. l. 3. fo. 108

In the precedent Chapter the primitive and fundamental Jurisdiction which

which belongs to the King is treated of; it follows now to treat of the delegated, derived and ſubſtituted Juriſdiction, where a man hath no Authority of himſelf, but what is committed to him, as when he that doth ſo delegate or ſubſtitute another, cannot himſelf determine every particular Cauſe, and to the end his labour may be the eaſier, by dividing the burthen amongſt divers other perſons, he ought to chooſe in his Kingdom wiſe men, fearing God, in whom there is ſincerity and truth of ſpeech, who hate Covetouſneſs, and of ſuch to conſtitute Judges, Sheriffs, and other Bailiffs and Miniſters, to whom may be referred as well Queſtions upon doubtful matters, as Complaints upon injuries, who will not decline the courſe of Juſtice to the right hand nor to the left, for hope of Reward, nor fear of Puniſhment. And a little further, treating of the ſeveral ſorts of Juſtices, he ſays thus; *Item Juſticiariorum quidem*

dem ſunt capitales generales perpetui & majores a latere, Regis reſidentes, qui omnium aliorum corrigere tenentur injurias & errores; ſunt etiam alii perpetui certo loco reſidentes ſicut in Banco, loquelas omnes de quibus habent warrantum terminantes qui omnes Juriſdictionem habere incipiunt præſtito ſacramento; item ſunt alii Itinerantes de loco in locum ſicut de Comitat' in Comitat' quandoq; ad omnia placita quandoq; ad quædam ſpeciali ſicut ad Aſſiſas tantum & Gaolas; Et qui authoritatem habere incipiant ſine ſacramento cum breve Domini Regis receperint de waranto ſunt etiam Juſticiarii conſtituti ad quoſdam Aſſiſas duos vel tres vel plures; qui quidem perpetui non ſunt quia expleto Officio Juriſdictionem amittunt: That is to ſay, Of Judges ſome are chief, univerſal, conſtant, and of greater power than others, always with the King, whoſe buſineſs it is to correct the Injuries and Errors of other Judges; and there are others that are of a conſtant

ſtant continuance, reſident in a certain place; as in the Bench, determining all Pleas whereof they have a warrant to determine; all of whom begin to have Juriſdiction by taking the Oath of their Office. Alſo there are other Judges that move from place to place, as from County to County, ſometimes to determine all Pleas, ſometimes ſome particular Pleas, as Aſſizes only and Gaol-deliveries, whoſe Authority begins without any Oath, when they receive the King's Writ for their Warrant; and there are Judges conſtituted to determine ſome certain number of Aſſizes, as two, three, or more, who are not of conſtant continuance, but having done what they were appointed to do, they loſe their Juriſdiction. And a little further, *Et quamvis quidem eorum perpetui ſunt, ut videtur finitur tamen eorum Juriſdictio multis modis, ſcilicet mortuo eo qui delegavit, vel mortuo eo ſub cujus proprio nomine cauſa delegatur. Item cum delegans revocaverit*

verit Jurisdictionem, vel alium dederit Justiciarium: That is, Altho' some of the said Justices are of constant continuance as it might seem, yet their Jurisdiction may be determin'd several ways; that is, by the death of him who gives them Authority, or by the death of him in whose name the Suit is begun, or when he that delegates, or gives the Authority, doth revoke the Authority and Jurisdiction which he gave, or appoints another Judge. And to conclude that matter, he says, That no Judge so substituted or delegated by our Lord the King, can substitute or delegate another.

Thus far *Bracton*; whence it is most clear, that all primitive and original Jurisdiction was in the King, and all substituted and delegated Jurisdiction was derived from Him only, and under such limitations as he directed, so as the Judges did act justly; the main charge of administring Justice being on Him; and he frequently

quently ſate himſelf in Judgment, aſſiſted by his *Capitales Juſticiarios à latere ſuo reſidentes*, who aſſiſted him in the exerciſe of his Juriſdiction, and eas'd him of trouble; but they never pretended to deprive him of his power of hearing and determining himſelf, or changing his Judges, or aſſigning them Juriſdiction as ſhould be needful, according to the modern Doctrine of ſome; for he had both complete Juriſdiction, and *deſignationem Juſticiariorum*, in himſelf; and it was upon good reaſon this power was originally placed by God in Kings, and conſented unto, and approved of by good men; for by the aſſiſtance of, and reaſoning with their Judges, they could never fail of diſcerning right Judgment, and their affection to their Subjects (like a good Father to his Children) being equal to all, it is not likely they ſhould be partial in their Judgments; and their Royal Eſtate is ſuch, as not to value Bribes or Rewards:

So that there is not so much reason to fear Injustice from a *King*, as from a *profess'd Lawyer*, (like my self) whose aim and design (perhaps) from his Horn-book, was gain and profit, and to raise himself a Name and Family in the world. I can but wonder then, whence started that humour in men, rather to trust any body in deciding their Controversies, than the King? sure it could be from no just Principle.

Besides the fore-mentioned Author *Bracton*, there are others of the same standing, that maintain the same Doctrine.

The next I shall name is one *Hern*, who about the time of *Edw.* 1. compiled a Book *Of the Laws and Usages of* England, a great part whereof (as Sir *Edward Cooke* in his Preface to the 9*th.* part of his *Reports* affirms, were such Laws as the Kingdom was govern'd by for about 1100 years then past; to which Book he gives a mighty credit, and in matters of difficulty

difficulty is very frequently his *ipse dixit*; and that Author says, That Jurisdiction is the chiefest Dignity that appertains to the King: and thereof, he says, there are two sorts, and he calls them ordinary, and assign'd, which are the same with Original and Delegated, as the other Author terms them. *Jurisdiction* (says he) *can be assign'd by none but by the King; and he may do it, because he cannot without assistance perform such a charge; and therefore it was of old ordained, that there should be a Seal, and a Chancellor to keep it, and grant Writs remedial to all Complainants without delay.* This was the Chancellors Province then.

Mirror 254.

Ibid. 234.

And again he says, Jurisdiction est un poiar a dire Droit; a power of commanding right to be done; and this power God gave unto *Moses*, and such as hold the like place as he; and this power belongs unto the King within his

Dominions, and He, by his Authority-Royal, makes his Justices in several degrees, and doth limit to every one his power after several manners. And there he enumerates divers sorts of Commissions and Courts; and speaking of the chiefest Justices of all, he says, *They determin'd matters more or less, according to the nature of their Commission*; From whence also it follows, there were no Judges that had or pretended to have, any Jurisdiction originally or fundamentally in themselves; but what all of them had, was by deputation and delegation from the King. Furthermore, *Edw. I.* out of his Princely care that his people should be govern'd by certain and known Rules, caused the Laws and Rules of Government, and disposition of Property, which theretofore had been used in the Kingdom, to be put in writing, and publish'd in his own Name; and at the same time commanded

Ibid. c. 15.

Britt. fo. 1.

manded the use and practice of those Laws in all points throughout his whole Dominion; saving, and always reserved to himself, the power of repealing, altering, and amending of them, as should seem good to him, with the assent of his Earls, Barons, and others of his Councel; and saving such Usages and Customs as had been time out of mind used, so that they be not discourdants a droit. And there he proceeds in this manner, *viz.* En primes en droit de nous meismes & nostre Courte avoums issint ordeyne, &c. which is to this effect, That first of all, in the right of Himself, and of his Court, because he could not in his own Person hear and determine all the complaints of his people; and to the end that his charge should be divided as is thereby appointed, he did ordain, and his will and pleasure was, *That his own Jurisdiction should be superiour to all the Jurisdictions in his Realm*: So that in all manner of Felonies, Tref-

paſſes, Contracts, and in all manner of Actions real and perſonal, he had power to give, and cauſe to be given, ſuch Judgments as thereto belonged, without any other Proceſs, (where he knew the direct truth) as Judge. And there alſo he appoints, That the Steward of his Houſhold ſhould repreſent Him within the Verge, and he aſſigned him his Juriſdiction, which was, *to hear and determine the preſentments of Articles which concern the Crown, whenſoever it ſhould ſeem good to the King*; And moreover, he will'd, that Juſtices in *Eyr* ſhould be aſſign'd to hear and determine thoſe Articles in every County, and in every Franchiſe, from ſeven years to ſeven. And there he gives the like power to his Juſtices of *Ireland* and *Cheſter*; and wills further, That the Count or Earl of *Norfolk*, by himſelf or ſome other Knight, ſhould always attend upon the King and his Steward within the Verge of the King's Houſe, ſo long as he ſhould

hold

hold the Office of Marſhal. And there he appoints the Juriſdiction of the Juſtices aſſign'd, *to follow the King, and be where He was, if in* England; *and that they ſhould have* Britt. fo. 2. *conuſance to amend falſe Judgments, to determine Appeals, and other treſpaſſes done againſt the Kings Peace and Juriſdiction.* He alſo appointed a Coroner to be in the Kings Houſe, and in every County (un Aſſcount) a Sheriff; and that under thoſe Sheriffs there ſhould be Hundreders, Serjeants and Bailiffs, who ſhould attend upon the Sheriffs. He alſo appointed Coroners in every County, and allotted them their Juriſdiction. And moreover, his will and pleaſure was, *That there ſhould be Juſtices always reſiding at* Weſtminſter, *or elſewhere, (where he ſhould appoint) to determine ſuch common Pleas as the King ſhould command them by his Writs, ſo as the Pleadings ariſing thereupon ſhould be recorded.* He ſettled, the Juriſdiction of the *Exche-*

quer Court, and ordained, That there ſhould be Juſtices aſſigned for every County, to have conuſance in ſuch cauſes as the King ſhould command by his Letters-Patents touching Pety-Aſſizes, and of other things whereof the Kings will ſhould be they ſhould make record, and that there ſhould be Juſtices of Gaol-delivery in every County; And he granted to the ſaid Juſtices, that they ſhould have the keeping of the Records of the Pleas pleaded before them; But they were not to raſe or amend their Rolls, or to make Record contrary to their Enrollments; Alſo, that the power of the Juſtices ſhould be limited in ſuch manner, that they exceed not the points contained in the Writs or Preſentments of Jurors, nor complaints to them made, ſaving ſuch incident matter, as without which the original cauſes could not be determined. And he utterly forbids and prohibits that any ſhall have power to amend any unjuſt or

erroneous

erroneous Judgment of his Juſtices, but only thoſe Juſtices which followed Him and his Courts, (who thereunto were by him entitled) or Himſelf or his Councel; for that matter he ſpecially reſerv'd to his own Juriſdiction. He forbids alſo all his Coroners and Juſtices, except his *Seneſchal*, his Steward, and his Juſtices of *Ireland* and *Cheſter*, to make any Deputies to do any thing whereof they ought to make record, without the King's leave. He will'd alſo, That in Counties, Hundreds, and in the Courts of every frank Tenement, there ſhould be Courts held by the Suitors; and alſo in Cities, Towns, Boroughs, and Franchiſes, *&c.*

Beſides this Book, written by King *Ed.* 1.'s command, and in his own name, a while after there was another Book written, (by whom it is not known) called *Fleta*, and it was in the Reign of *Ed.* 2. or 3. And that Author ſays, *That Judgment is*

a

Fleta lib. 1. cap. 17. fo. 16. *a threefold act, of three persons at the leaſt, the Judge, the Plaintiff and the Defendant, without which there can be no Judgment: Nor* (ſays he) *can any one Judge in temporal matters, but only the King, or his Subſtitutes and Delegates.* Aud the ſame Author, in his Tract of the diverſity of Courts, ſays as followeth: *The King hath a Court in his Councel, in his Parliaments when preſent, the Prelates, Earls, Barons, Nobles, and other skilful men, who are to determine the doubts of Judges, and where, upon appearance of any new ſort of injuries, new remedies are provided; and where Juſtice is to be rendred to every one according to what belongs to him.* He hath alſo his Court before his Steward in *Aula ſua*, in his Hall, *who now* (ſays he) *ſupplies the place of the* Capitalis Juſtiar'; whereof mention is made in the common Writ of *homine replegiando*, who was wont to hear the Kings

Fleta lib. 2. fol. 16.

Kings own Cauſes, to rectifie falſe Judgments, and to do Juſtice to Complainants, without Writ; whoſe Power, in part, the ſaid Steward of the Kings Houſhold hath. Alſo, the King hath his Court of *Chancery* in ſeveral places in his Houſe. He hath alſo a Court before his Auditors ſpecially appointed, to be near the King, whoſe Office extends but to the Juſtices and others of the Kings Miniſters, to whom there was no power granted to determine what they heard, but to relate the matter to the King, that he might direct puniſhments according to the quality of the Offence. He hath alſo his Court and Juſtices, as well Knights as Clergy-men, (*locum ſuum tenentes in* Anglia) before whom, and not elſewhere, unleſs before Himſelf and his Council and ſpecial Auditors', falſe Judgments and Errors of Juſtices are reverſed; and there are determined Writs of Appeals, and other Writs upon criminal Actions, and injuries *contra pacem*. He

He hath also his Courts and his Justices residing in the *Exchequer*, and also in *Banco* (now called the *Common-Pleas*) at *Westminster*, and some are assign'd for Gaol-deliveries in every County, and some are assigned to take Assizes generally in every County, and some are itenerant, and constituted to hear and determine all criminal and civil Pleas. Also, the King hath his Justices itenerant, to hear and determine the Pleas of the Forest; and he hath his Court in every County, and in the Sheriffs Turn, and in Hundreds, and in the King's Manors, Cities and Boroughs, as in the Hustings of *London*, *Lincoln*, *Winchester*, *York*, and other places.

Flet. l. 2. f. 75. cap. 33. And the same Author having afterwards treated more particularly of what Jurisdiction the King had delegated to every Court, he writes thus of the Chancery: *There is, amongst the rest, a certain Office called the* Chancery, *which ought to be committed*

mitted to the care of some prudent man, as a Bishop or Clergy man of great dignity, together with the care of the great Seal of England, *under whom are all the Chancellors in* England, Ireland, Wales *and* Scotland, *and all Keepers of the Kings Seals, (except the Keeper of the Privy Seal) to whom are associated* Clerici honesti, *honest and circumspect Clerks, sworn to our Lord the King, and who in the Laws and Customs of* England *have ample knowledge; whose Office it is to hear and examine the Complaints of Complainants, and to grant due remedy by the King's Writ, according to the nature and quality of the wrong.* And there he treats at large of the Officers, Clerks, and Business of the Chancery, which was to make out Remedial or Original Writs, and Judicial Writs, also upon Recognizances and Contracts made in the Chancery, and enroll'd there: but not one tittle or mention is there made by any of the said Authors, of

any

any Superiority the Lord Chancellor or Lord Keeper, or the Court of Chancery had over the Proceedings of any of the other Judges, either to examine, correct, or rectifie their Judgments, or stop execution thereof, upon any account, colour or pretence whatsoever; which is a most convincing proof, the Chancellor then had no such power.

Sect. III.

What *is meant by* Judging according to Equity; *and by* Whom *it was anciently performed.*

HAving laid the foundation of my present purpose upon what I find in the fore-mention'd Authors, I think it not amiss to say somewhat touching their credit; and first of all, that which gives them a reputation with me, is, that they set down what

what they themſelves of their own knowledge knew to be true; they relate what the Law was at the time of the writing of thoſe Books, they took nothing upon truſt from other hands, but ſet down what they themſelves knew to be practice. Next, they were men of great Eminency; *Bracton* was a learned Judge, and it was his zeal to Juſtice induc'd him to write; *Britton* was a Book writ by the King's own command, and publiſh'd by his approbation; and the others, *Mirror* and *Fleta*, have always had a great reputation amongſt the *Engliſh* Lawyers, not only ancient, but modern; and Sir *Edward Cooke*, who once was honour'd with the title of *the Oracle of the Law*, in his firſt *Inſtitutes*, in every page almoſt quotes thoſe Authors for proof of his aſſertions; and ſo doth *Stanford* in his *Pleas of the Crown*: from whence I conclude, that what they wrote for Law, was Law *then*; and if ſo, it is Law *now*, ſaying wherein

it

it is alter'd by the Kings Parliamentary Act; nothing less than That could change the Law.

Bract. f. 3. *Bracton*, speaking of Equity, says, *Equitas autem est rerum convenientia quæ in paribus causis paria desiderat jura, & omnia bona coæquiparat*: It is a certain sort of accord and congruity in things, which affects the like Judgments in like Cases, and equally and indifferently considers all circumstances. Equity is that Right which arises and appears upon a due consideration of the written Law, the circumstances of the matter in question, and that natural Justice which a good conscience dictates; and to judge and determine the matter accordingly, I take to be a *judging according to Equity*.

Britt. fo. 1. It should seem that all the Judges mentioned by the said Authors, were ty'd to proceed and judge according to prescribed Rules; for by *Britton* it appears,

that

that it was the King's will the Laws (which are Rules) should be set in writing, and used and kept in every point, saving to himself, with consent of his Counts, Barons, *&c.* power to repeal and amend them; but it belong'd to himself alone, principally and in chief to amend false Judgments of his Justices generally, as appears by this; **Car ceo reservouns nous especialment a nostre Jurisdiction.**

The King's command to use the Laws and Rules in every point strictly, was general to all his Judges; but it was only He that had power in all his Judgments to regard Equi- above Rules; and he had not only *power* so to do, but he was *oblig'd* to it by the latter part of the Coronation-Oath before-recited. It was the King only had an extraordinary Prehemi-nence over the prescribed Rules and

Bract. lib. 3. fo. 107.

Bract. lib. 2. fo. 24.

Forms of Law, to moderate the rigour and extremity, and ſupply the defects thereof upon occaſion, when his Judges could not exceed the Rules preſcribed them; and this power is as neceſſary as any thing can be for the right diſtribution of Juſtice; for it is impoſſible to make ſuch Rules before-hand, as may ſuit with all caſes; for an extraordinary circumſtance may ſometimes happen in ſome caſes, that to judge thereof according to general and preſcribed Rules of Law, might be to wrong the party, and ſo make *ſummum jus, ſumma injuria.* But our ancient Kings did not entruſt this Power at any time, as I find, with any ſingle perſon: For, during the Reign of both the *Williams*, *Henry* 1. King *Stephen*, and *Henry* 2, *&c.* until *Ed.* 3's. time at leaſtwiſe, if not after, there ſtill continu'd a particular Court belonging to the King, which was the

Elſ. Office, ch. fo. 25.

Dud. Orig. Jud. fo. 25.

place

place of Sovereign Justice, both for matters of Law and Equity, called *Curia Domini Regis*, and *Aula Regia*, or *magna Curia*, where He himself oftentimes sate in person; but there he had his Justices *à latere suo sedentes*; as namely, his Chief-Justice, his Chancellor, his Constable and Marshal, and such others of his Nobles as the King pleas'd to associate to himself for that purpose: The Justice, to inform the King of what was the strict Rules of Law; and the Chancellor, who was usually a spiritual man, to give advice according to Equity, and there matters of Equity were then determined; And to this Court any man might appeal from the inferiour Courts, to have the Errors of the Judges corrected and amended; and if the King were absent, the Justiciar was the

Capital' Justic' præsidet primus a Rege in Regno C. 4. int' fuit. Cancellarii *Angliæ* Dignitas est ut secundus a Rege in Regno habeatur, ibidem fol. 78.

the King's chief Representative.

But when it was that first the Chancellor had that power of judging according to Equity so given him, that he alone could do it of course, is not certainly known.

Orig. Jud. fol. 36. Mss. Lamb. Anno.

Some suppose, that in *Ed.* 1.'s time, when the Power of the *Justiciarius Angliæ* declin'd, the King, together with the Great Seal, entrusted the Chancellor with his own extraordinary preheminence of Jurisdiction over the Common Law, *viz. Power of judging according to Equity*: but that Authors reason is not sufficient to maintain that supposition; for he gives no reason for it, but *that he finds no mention made of any such power in the* Chancery *by* Britton; which was wrote about the beginning of the Reign of *E.* 1. Yet *Britton* mentions the Jurisdiction of all the other Courts; and he concludes from thence, *that if the* Chancellors *had then had any*

such

such power, Britton *would have mentioned it*: which indeed is a good argument that the Chancellor had no such power then, but it doth not follow of consequence, that because he had it not when *Britton* was writ, that he must needs have it immediately thereupon; therefore we must come a little, yea a great way nearer, before we can find this power fixed in the Chancellor alone.

No doubt but when the *Justiciarius Angliæ* was laid aside, the Chancellor, who before that time was but *secundus à Rege in Regno*, became then *primus à Rege*, and was President over the rest when any matter of Law or Equity was determined in *magna Curia*, in the absence of the King; but I cannot find he exercised the Judicative power in matters of Equity alone, until very lately, tho' he did several other things alone. I find, that in *R.* 2.'s time a matter being compromited by

4 Inst. fo. 83. Mag. Cha. 553.

both sides to the King, the King referred it to the Councel, and they make a Decree, which Decree was sent to the Chancellor to confirm under the Great Seal, which was done; after which one of the parties petitioned the King that the matter might be left to the determination of the Common Law; whereupon the King, by warrant under the Privy-Seal, requires the Chancellor to make *Supersedeas* to the Decree, which was done: whereby it appears, the Chancellor alone did nothing but award Process upon the Decree made by the Councel, as the King and They directed. *And this*, Sir *Edw. Cooke* says, *was the first Decree in* Chancery *that ever he observed in all his reading.*

Coke's Magna Chart. 4. 83.

He also cites some opinions, that the Court of Equity in Chancery began under *Henry Beaufort* Son of *Jo.* of *Gaunt*, who was Chancellor in the beginning of *H. 6.*'s time; and his reason

reaſon for it is, *becauſe there is not in any Book-Caſe, or Report of the Law, any mention made of any* Court of Equity *held before the* Chancellors *before the Reign of* H. 6. *and yet all of them ſpeak of the ordinary Power and Juriſdiction of the* Chancery: But in the Reign of *H.* 6. and *E.* 4. Caſes have been reported to have been determined in Chancery, according to Equity; but it is obſervable, that moſt of thoſe Cauſes were heard before ſeveral others, together with the Chancellor; and that in matters of doubt, he adjourn'd the parties into the *Exchequer-Chamber* before himſelf and the Juſtices of both Benches, and made his Decrees according to their Opinion: As for inſtance; In the Year-book of the 37*th.* of *H.* 6. fo. 13. the Caſe was, *That one* A. *had bought of* J. R. *ſeveral Debts due to* J. R. *from ſeveral perſons, and* A. *gave a Bond to* J. R. *for the ſum; And foraſmuch as thoſe Debts were but things in Action, and*

no Property was chang'd, nor no Action accru'd by the bargain to the said A. but the Debtors remained Debtors still to the said J. R. so that A. had nothing for the money secured by the obligation. A. prays in Equity to be discharged of the said Bond against J. R. and prays a Subpæna *against J. R. and it was granted, and the Defendant answered, and the* Chancellor, *because the matter seemed doubtful to him, adjourn'd it to the* Exchequer-Chamber *before himself and the Justices of both Benches, and there it was debated, and by the Opinion of all the Justices, because the said A. had not* quid pro quo *by that bargain, therefore the Bond ought to be releas'd, and it was decreed accordingly.*

The like will appear to be done by the Book-cases following, 37 *H.* 6. f. 35, 36. 39 *H.* 6. f. 26. 7 *E.* 4. f. 14, *&c.* And if he did not adjourn the Causes into the *Exchequer-Chamber*, he always had the Judges, or some of them, with him at all hearings,

rings, and decreed according to their Opinions; for the entry of the Decrees in Chancery of *H.* 6.'s time are after this manner, says the Author cited in the Margin, *viz. Consideratum est per Curiam ex assensu* Johannis Fortescue *Militis Capitalis Justiciar' Domini Regis ad placita tenenda & diversorum aliorum Justiciariorum & servient' ad legem in Curia præsent' existent' quod, &c.* and sometimes it was, *ex assensu omnium Justiciar' utriusq; Banci*, and sometimes of one or two Justices; but before the end of that King's Reign, the manner of entry of the Decrees was somewhat altered, and was in this manner; *Considerat' Adjudicatum & Decret' est per* Cancellarium *& per Curiam* Cancellar', without particular mention of any Justices or others, and so it continued till *H.* 8.'s time; But towards the end of his Reign, whereas before that time the Decrees were in *Latine*, and in very few words,

Elf. Off. of Chan. fo. 51.

words, and entred on the back-side of the Bills, they then began to be drawn up in *English* apart by themselves, and therein reciting the Bill and Answer, and afterward were enroll'd in Rolls by themselves: The ancientest of that nature that I can find, are in the Rolls Chappel, and are of the *27th.* and *28th.* of *H.* 8. when Sir *Thomas Audley* was Chancellor. In Queen *Maries* days the entry of all the Decrees is, *That it is Ordained, Adjudged and Decreed by the Lord* Chancellor, *and by the whole* Court of Chancery, *That so and so:* and after the same manner it is at this day, saving that the conjunctive clause *And by the High-Court of Chancery*, (which in the beginning was not inserted in vain) is now altogether superfluous and impertinent; for the Lord Chancellor or Lord Keeper, without the assent or consent of any other, have made Decrees for some years past according to his own *liberum arbitrium*, as I shall shew in the next Section.

SECT

SECT. IV.

Of the modern and present Power and Jurisdiction of the Court of Equity in Chancery.

IN the *Chancery* are two Courts, one Ordinary, wherein the Lord Chancellor or Lord Keeper of the Great Seals proceeds according to the right line of the Law, and if he gives an Erroneous Judgement, there a Writ of Error lies returnable in the *Kings Bench*; the other is Extraordinary, wherein the Chancellor ought to proceed according to the Rule of Equity, which according to what it is now taken, is what is according to the Chancellor's single Conscience,

C. 4. Inst. fo. 79.

Plowd. 393. que *B. R.* est le Plus hauk. Court. *Dyer* 315.

Elf. Office of Ch. fo. 41.

quecunq; fit ; it is (ſay ſome,) an abſolute Power without controul, other then in Parliament, and ſpreadeth it ſelf moſt largely without any Limitation, it ſtops the proceedings of all the other Courts at *Weſtminſter*, it renders all their Judgements vain and ineffectual, *durante bene placito*, of the Chancellor or Keeper, and ſtops Execution, untill his Conſcience be ſatisfied whether the Plaintiffs at Law ought to go on or no, by which means when a man hath a Judgement fairly obtain'd at Law, or intends to Sue there for a Juſt and True Debt, if the Defendant at Law becomes Plaintiff in *Chancery*, and he or his Councel hath but Invention enough to ſuggeſt any ſort of Equity, there's an Injunction had of courſe, until the Plaintiff at Law can put an Anſwer to the Bill; which if he lives any thing remote from *London*, it will take up a Month or two's time,

or

or more, to send an Answer, and in the mean time the Debtor prepares his Bag and Baggage, and by that time the Injunction can be Dissolv'd, which cannot be without a considerabe Charge, the Gentlemen is perhaps got to *Ireland*, *Jamaico* or *Japan*.

What ever is now finally determin'd in Equity in *Chancery*, it is done by the Chancellor or Lord Keeper alone, and though the Clerks and Registers retain in drawing up their Decrees somewhat of the old form, *viz.* *That it is Decreed by the Lord Chancellor or Lord Keeper, and by the High Court of* Chancery; which implyes there were some others ought to have a hand in making the Decree; yet there is none that now have, for though there are two at least of twelve that bear the name of Masters in *Chancery*, and heretofore were accounted *Socii* and *Collaterales* to the Chancellor that daily sit in Court one on each side

of

of the Lord Chancellor or Keeper; yet they are now but as his Attendants, and speak not a word in determining any Causes, their only business being to wait and expect how many References the Lord Chancellor will make to them touching insufficient Answers, Scandalous Bills or Answers, Contempts, stating of Accounts and the like, they being to have a Fee for their Report therein, yet that Report is subject to the controul of the Chancellor or Keeper, if he pleases; And if at any time, which is but seldom, any of the Judges are sent for, it often proves to be meerly out of Formality, for their Opinions are seldom regarded.

Elf. Office of Ch. 4 fo. 6.

It is said of the Chancellor and Keeper of the Great-Seal of *England*, that he is like the *Roman Prætor*, in whose Constitutions there were said to be two kinds of Powers; one was, when without the

the Advice of the Judges he would Manumittise, Emancipate, Award Possessions of Lands and Goods, Commit Wardship of Pupills, and grant Injunctions as he thought convenient: The other sort of Power the *Prætor* had, was when he proceeded to Judgment according to *Leges Regis*, &c. The Kings Laws, the Laws of the Twelve Tables, the Civil Law, Laws made by the consent of the People, or Decrees of the Senate, and therein he was not absolute as in the other: But our Chancellor or Keeper and their *Prætor* do do differ very much, for the *Prætor* would at his Entry into that Office propound and publish certain Edicts, which were Principles and Fountains out of which he would derive his Decrees; but what Rules or General Notions the Lord Chancellor or Lord Keeper in *England* doth assign unto himself for Limitation of Equity, and direction of his Conscience, those lie hid and concealed

cealed in his own Breast, so that neither the Man of Law nor Equity is able to inform his Client what is like to become of the Cause, and consequently no man is able to know what is his own, so that it may be said of this great Officer arm'd with this great Power, as was said of *Jeremiah's* Figs; *Those that were good, were very good; but those that were evil, were exceeding evil:* For that Power if it be used according to the true intent and design of it, is of Excellent use, but if abus'd, it is the greatest oppression imaginable; and that that Power hath been abused, will appear by the next Section.

Jer. 24.

Optima corrupta sunt pessima.

SECT.

SECT. V.

Of the Corruptions *and* Miſtakes *of ſome Great* Chancellors.

I Find in the Journal Book of the Lords Houſe in the year 1620. and in the 19*th.* year of King *James*, that on the 19*th.* of *March* in that year, a Meſſage was ſent from the Lower Houſe to the Lords, importing; *That they had found Abuſes in certain Eminent Perſons, about which they deſired a Conference with their Lordſhips, that ſuch courſe might be taken, as might ſtand with the Honour and Dignity of a Parliament*; which was agreed to by the Lords, and the Conference was appointed to be that afternoon; and the next day it was Reported to the Lords by the Lord Treaſurer: *That at the Conference was deliver'd the deſire of the Commons to inform their Lordſhips*

what they had found in their Inquiry after the Abuses of the Courts of Justice, where, after having highly commended the incomparable good parts of the then Lord Chancellor, and magnified his place from whence Bounty, Justice and Mercy were to be distributed to the Subject, with which he was wholly Intrusted: *They declared that the Lord* Chancellor *was Accused of great Bribery and Corruption committed by him*; And instanced two Cases, one concerning one *Christopher Awbrey*, and the other concerning one *Edward Egerton*: As to *Awbrey*, the matter was, *That He having a Cause in* Chancery *between Him and Sir* William Brunker, Awbrey *feeling some hard measure, was advis'd to give the Lord* Chancellor 100 l. *which he deliver'd to his Council Sir* John Hastings, *and He to the* Chancellor; *but notwithstanding the business proceeding slowly*, Awbrey *writ several Letters, and deliver'd them to the Lord* Chancellor,

but

but could never have any Anſwer from his Lordſhip; but at laſt delivering another Letter, his Lordſhip told him, if he importun'd him, he would lay him by the Heels: As to *Egerton's* matter, it was ſet out at large at the Conference; and will appear by the ſubſtance of *Egerton's* Petition to the Lords, the effect whereof (amongſt other things,) is as followeth; *That the ſaid* Edward Egerton *being Unmarried and Sickly, he ſettled his Eſtate to the uſe of himſelf and the Heirs Males of his Body, and for default of ſuch Iſſue, the Remainder to Sir* John Egerton *and his Heirs, which Settlement was voluntarily made, without any conſideration paid for the ſame, and with Power of Revocation; and that Sir* Rowland Egerton, *Son and Heir of the ſaid Sir* John Egerton, *had got the ſaid Settlement into his hands, and all the Petitioners Writings; and that the late Lord Chancellor* Elſemere *had Decreed, that Sir* Rowland Egerton

should have the manner of Wrinehal *and* Haywood Barnes, *being a great part of the Petitioners Inheritance, worth* 600 l. per Annum, *without any cause of Equity contain'd in the said Decree; and that the Petitioner had made humble Suit to the Lord Viscount St.* Albans, *then Lord Chancellor of* England, *to have the benefit of a Subject, to recover his Ancient Inheritance by Ordinary course of Law; and that his Lordship took from the Petitioner* 400 l. *in Gold, and* 52 l. 10 s. *in Silver Plate, which Money was accepted of by the said Lord Chancellor, saying withall, That the Petitioner had not only Enrich'd him, but laid a tye upon him to do the Petitioner Justice in his Rightful Causes, and by great Oaths and Protestations drew the Petitioner to Seal an Obligation to his Lordship of ten thousand* Marks, *to stand to his Lordships Award; and that afterwards the Petitioner was divers times sent for by one* Robert Sharpeigh, *then Steward of his*

his Lordſhips Houſhold; and that the Petitioner was ſeveral times offer'd, that if he would then preſently pay 1100 l. *in ready Money, that is to ſay,* 1000 l. *to his Lordſhip, and* 100 l. *to* Sharpeigh, *the Petitioner ſhould have all his Lands Decreed to him, which Money he could not readily pay; and that afterwards the ſaid Lord Chancellor did not only confirm unto the ſaid Sir* Rowland Egerton, *the Land which he then held of the ſaid Petitioner's Inheritance, being worth* 600 l. per Annum, *but took away more Lands worth* 1500 l. *and Decreed the ſame to Sir* Rowland Egerton, *who did not claim any Title thereto, before the ſaid Bond taken, and Unlawful Decree made; and that he alſo Decreed the Bond ſhould be Aſſigned to Sir* Rowland Egerton: *And the Petitioner having ſpent* 600 l. *in Suits, and being depriv'd of all his Evidences by the ſaid Lord Chancellor, and by the indirect practice of the ſaid Sir* Rowland: *He was likely to*

be utterly defrauded of all his Ancient Inheritance, contrary to the common Justice of the Land, unless reliev'd by their Lordships. The Contents of which Petition, the Petitioner made Oath to be true; and he and *Sharpeigh* were further Examin'd touching the matter.

By the Journal of the Lords House for the 21*st.* of *March*, in the year 1620. It appears that there had been Information given to the House, that there had been a Cause depending in *Chancery* between one *Smithwicke* and *Wiche*, which was matter of Account, and had been Referred to Merchants, and the Merchants had Certified on *Smithwick*'s behalf; yet to obtain a Decree in the Cause, he was told by one *Burrough*, (that was near to the Lord Chancellor) that it must cost him 200 *l.* which he paid to the use of the Lord Chancellor; yet his Lordship Decreed but one part of the Certificate:

Where-

Whereupon he treats again with *Burrough*, who demands another 100 *l.* which *Smithwick* alſo paid to the uſe of the Lord Chancellor; then his Lordſhip Referr'd the Accounts again to the Merchants, who Certified again for *Smithwick*, yet his Lordſhip Decreed the ſecond part of the Certificate againſt *Smithwick*; and the firſt part, which was formerly Decreed for him, his Lordſhip made doubtful: whereupon *Smithwick* Petition'd to the Lord Chancellor to have his Money again, and he had it.

It appears further by the ſaid Journal Books, that ſeveral days were in a great part Employed in taking Examination of Witneſſes in proving and detecting the Briberies and Corruptions of that Lord Chancellor; which being ended and collected, were order'd to be Tranſcrib'd with the Proofs; and on the 24*th.* of *April* following were order'd to be ſent to his Lordſhip, with a

Meſſage that the Lords requir'd his Anſwer with all convenient ſpeed.

The Corruptions, as they are mentioned to be prov'd in the Journal of the Lords Houſe of the ſaid 24*th.* of *April*, are as followeth:

	l.
That in the Cauſe between Sir Rowland Egerton *and* Edward Egerton, *his Lordſhip received on the part of Sir* Rowland Egerton *before he decreed for him*, ——	500
Item, *of* Edward Egerton *in the ſaid Cauſe*, ——	400
Item, *in the Cauſe between* Hodie *and* Hodie, *a dozen of Buttons (after the Cauſe ended) of the value of* ——	50
Item, *of the Lady* Wharton,	310
Item, *of Sir* Tho. Munke,	100
Item, *of Sir* John Trevor,	100
Item, *of one* Young, ——	100
Item, *of one* Fiſher, ——	106
Item, *in the Cauſe of* Kenday *and* Valore, *of* Kenday *a Cabinet worth* ——	800

Of

Of Valore (*borrow'd at two times*)	2000
Item, *in the Cauſe between* Scot *and* Lenthall, *of* Scot—	200
Item, *of* Lenthall,	100
Item, *of one* Wroth, *who had a Cauſe between him and one* Mannering,	100
Item, *of Sir* Ralph Hansby,	500
Item, *in the Lord* Mountaine's *Cauſe, of the Lord* Mountaine, *and more promis'd at the end of the Cauſe,*	600 or 700
Item, *of one Mr.* Dunch,—	200
Item, *in a Cauſe between* Raynold *and* Peacock, 200*l.* *in money, and a Diamond Ring worth* 5 *or* 600 *l.*	700 or 800
Item, *of* Peacock,	100
Item, *in a Cauſe of* Barker,	700
Item, *there being a reference from his Majeſty to his Lordſhip of a buſineſs between the Grocers and Apothecaries, he had of the Grocers*	200

Of

	l.
Of the Apothecaries, (besides a rich present of Ambergreece)	150
Item, *of the* French *Merchants, to constrain the Vintners of* London *to take* 1500 *Tuns of Wine; to accomplish which, he used very indirect means, by colour of his Office and Authority, without Bill or other Suit depending, as threatning and imprisoning the Vintners, for which he receiv'd of the Merchants*	1000

Lastly, *That he had given way to great exactions by his Servants, in respect of private Seals, and sealing Injunctions.*

By the Journal-book of the 25*th.* of the said month it appears, that Baron *Denham* and Mr. Attorney-General reported their delivery of the Charge of the Lord Chancellors corruptions to his Lordship, and that he said he would return the Lords an Answer;

Anſwer: whereupon the Lords ſoon after ſent a meſſage by Baron *Denham* and Mr. Attorney, to know if he would make his Confeſſion, or ſtand to his Defence; to which they brought anſwer, That his Lordſhip would make no defence to the charge, but meant to acknowledge corruption, and to make a particular confeſſion to every point, and after that, an humble ſubmiſſion; but he humbly crav'd liberty, that wherein the charge was more full than he finds the truth of the Fact, he may make declaration of the truth in ſuch particulars; the charge being brief, and not containing all circumſtances: Whereupon the Lords ſent the ſame Meſſengers back to him, to let him know, they had granted him time till *Monday* next, being the 30*th.* of *April*, at 10 in the morning to ſend ſuch Confeſſion as his Lordſhip intended to make.

On the 30*th.* of *April* the Lord Chief-Juſtice *Leigh* (who then executed

cuted the place of Lord Chancellor) in the Lords Houſe, ſignified to their Lordſhips, that he had received a Letter and paper Roll ſealed up; which being delivered to the Clark of the Lords Houſe, and being opened, & found directed to their Lordſhips, it was read, and began thus:

To the Right Honourable the Lords Spiritual and Temporal, in the High-Court of Parliament aſſembled.

The Confeſſion and humble Submiſſion of Me the Lord Chancellor.

UPon adviſed conſideration of the charge, deſcending into my own conſcience, and calling my memory to an account ſo far as I am able: I do plainly and ingeniouſly confeſs, that I am guilty of Corruption; and do renounce all defence, and put my ſelf upon the Grace and Mercy of your Lordſhips.

The

The particulars I do confeſs, and declare to be as followeth :

To the firſt Article of the charge, viz. *in the Cauſe between Sir* Rowland Egerton *and* Edward Egerton, *the Lord Chancellor received* 500 l. *on the part of Sir* Rowland Egerton *before he decreed the Cauſe : I do confeſs and declare*, Upon a reference from his Majeſty of all Suits and Controverſies between Sir *Rowland Egerton* and Mr. *Edward Egerton*, both parties ſubmitted to my award by Recognizance reciprocally in 10000 Marks apiece, and thereupon after divers hearings, I made my award with advice and conſent of my Lord *Hobbart*, and the award was perfected and publiſh'd to the parties, which was in *February*; Then ſome days after the 500 *l.* mentioned in the charge was delivered to me; Afterwards Mr. *Edward Egerton* fled from the award; Then in *Midſummer* Term following a Suit was begun in *Chancery* by Sir *Rowland*, to have the award

award confirm'd; and upon that Suit was the Decree made, which is mention'd in this Article.

To the ſecond Article, viz. *That in the ſame Cauſe he received from* Edw. Egerton 400 l. *I confeſs and declare*, That ſoon after my firſt coming to the Seal, (being a time when I was preſented by many) the 400 *l.* mentioned in the charge was delivered unto me in a Purſe, and I now call to mind from Mr. *Edward Egerton*: But, as far as I can remember, it was expreſt by him that brought it to be for *favours paſt*, and not in reſpect of *favours to come.*

To the third Article of the charge, viz. *in the Cauſe between* Hodie *and* Hodie, *he receiv'd a dozen of Buttons of the value of* 50 l. *about a fortnight after the Cauſe was ended: I confeſs and declare*, That, as it is laid in the charge, about a fortnight after the Cauſe was ended (it being a Suit of great Inheritance) there were Gold Buttons about the value of 50 *l.* (as

is

is mentioned in the charge) preſented unto me, as I remember, by Sir *John Perient* and the party himſelf.

Thus far it is *verbatim* as it is in the ſaid Journal-book; and after the ſame form he proceeds, and confeſſeth the receipt of all the money and other things in the charge, and ſome particular ſums more, but with ſome little endeavours to extenuate the Crime; as, *that the money was ſent as a preſent after the Cauſes ended*; and confeſſed, *that he had impriſoned ſome of the Vintners, becauſe they refuſed to take off the* French *Wines*; *and that it was a great fault in him that he look'd not after his Servants.* And then follows theſe words, *viz. This Declaration I have made to your Lordſhips with a ſincere mind, humbly craving, that if there ſhould be any miſtake, your Lordſhips would impute it to want of memory, and not to any deſign of mine to obſcure truth, or to palliate any thing; for I do again confeſs, that in the points charg'd upon me,*

me, although they ſhould be taken as my ſelf have declared, there's a great deal of corruption and neglect; for which I am heartily and penitently ſorry, and ſubmit my ſelf to the Judgment, Grace and Mercy of this Court. And in the cloſe he prays, *That if they proceed to a Sentence, their Sentence may not be too heavy.*

The Confeſſion being read, the Lords ſent twelve Lords to know if it was his own hand that ſubſcrib'd the Confeſſion, and whether he would ſtand to it, or no? and being returned, they report, That they had ſhew'd it to him, and that he own'd it, and would abide by it: Whereupon it was ordered, That the Prince (attended by ſome of the Lords) ſhould move His Majeſty to ſequeſter the Seal; which being accordingly done, the Prince reports to the Houſe, That he had mov'd the King therein, and that his Majeſty had promis'd it ſhould be done, and that he intended to have done it if they had not mov'd it. The

The ſecond of *May* following a Commiſſion was granted to Sir *James Leigh* Chief Juſtice, to Officiate the place of the Lord Chancellor in the Lords Houſe; and the Great Seal was taken from the Chancellor, and by Commiſſion committed to be kept by the Lord Treaſurer, the Lord Steward, the Lord Chamberlain, and the Earl of *Arundell.*

Vid. Rot. Parl. ejuſdem temp.

There was not a ſingle Lord keeper from that time until the 10 of *July* 1621. the Buſineſs of the *Chancery* being then performed by the Commiſſioners.

The third of *May* the Commons ſent a Meſſage to the Lords to demand Judgment againſt the Lord Chancellor, to which the Lords return'd anſwer; That they were ready, if They with their *Speaker* would come to demand it; and the *Commons* being come to the Bar of the Lords Houſe, the Chief Juſtice *Leigh* pronounc'd the Judgment, which was,

1st. *That the Lord Viſcount St.* Albans *ſhould undergo a Fine and Ranſome of* 40000 l.

2d. *That he ſhould be Impriſon'd in the* Tower *during the Kings pleaſure.*

3d. *That he ſhould be for ever uncapable of any Office, Place or Employment in the State or Commonwealth.*

4th. *That he ſhould never ſit in Parliament, nor come within the Verge of the Court.*

I have been more particular in relating theſe proceedings of the late Lord Chancellor *Bacon*, becauſe of the great Learning and Eminency of the Man, and the little need he had to be ſo Corrupt, he had neither Wife nor Child to provide for; and if ſuch a man was guilty of Bribery and Corruption, who may we be ſure will not? And therefore great care ought to be taken to have Relief againſt ſuch contingencies; for Corruption in a Judge of that high commanding

Power,

Power, is far beyond all Robbery, Burglary, Rapine, or other Villany the World can invent.

To Err wilfully, and out of a corrupt design; is a greater fault, and more unpardonable, than to err through mistake; but the hurt is the same to him that is injur'd by the wrong Decree; Therefore if we were sure there would never be any such Corruption any more, yet Provision ought to be made against mistakes, since those have been very frequent: whereof I shall give some instances, and for which you shall need to look no further back then to the Journals of the Lords House in the last Session of Parliament at *Westminster*, where you may find that the 17*th*. of *November* 1680. a Decree in *Chancery* was Reversed upon the Appeal of *Crabb* against *Fenton*, and the 22*d*. of the same Month a Decree in *Chancery* was Revers'd by the Lords upon the Appeal of *Turner* against *Turner*; and on the

26th. of the ſame Month, another Decree in *Chancery* was Revers'd upon the Appeal of one *Chute* againſt *Dacres*, and many more Appeals were brought in that Parliament, which yet remain undetermin'd; and ſince the Lord-Keeper *North*'s having the Seal, he hath Revers'd ſeveral of the late Lord Chancellor *Nottingham*'s Decrees without any new matter ariſing ſince the Decree made, ſo that one of them muſt be miſtaken, but which of them, will not appear but by the judgment of divers others of as great Learning and Judgment as themſelves, and ſo it is to be determin'd; for many may ſee more than one, and I conceave the King may give them Authority ſo to do, without putting the Kingdom to the Charge and Trouble of convening a Parliament, as by the enſuing part of this Treatiſe will appear.

SECT.

SECT. VI.

That an Appeal to the King *in the Intervals of* Parliament, *is an Ancient, Legal Remedy againſt miſtaken Decrees in* Chancery, *with the manner of Proceeding therein.*

IT becomes not a ſingle man to be too poſitive in his own Opinion, therefore I ſhall only at preſent ſay, that I am moſt extreamly miſtaken in my Calculations, if His Majeſty hath not ſufficient Power in the Intervals of Parliament, as the Law is at this day, being the 26*th:* of *June* 1683. to provide for his Subjects, and to Relieve them againſt unjuſt Decrees in *Chancery*, if the matter be duely look'd into, notwithſtanding the Art and Labour that hath been uſed to conceal it; Therefore for maintaining of that

point, I ſhall once more repeat a Sentence out of *Bracton*, Et defendous generalment a tout que nul ne eyt poer de amender nul faux Jugement de nous Juſtices ſaude les Juſtices que ſuent nous et noſtre Court que a ceo ſont per nous entitles ou nous meſme on noſtre Councel car ceo reſerbouns nous eſpecialment a noſtre Juriſdiction; and *Fleta* ſpeaks to the ſame purpoſe, *Habet enim Rex curiam ſua &c. habet etiam curiam ſuam & Juſticiarios ſuos tam millites quam Clericos locum ſuum tenentes in* Anglia *coram quibus & non alibi*, NISI CORAM SEMET IPSO ET CONCILIO SUO VEL AUDITORIBUS SPECIALIBUS, *Falſa Judicia & Errores Juſticiariorum Reveruntur & corriguntur*: Whence it is manifeſt that when thoſe Authors wrote the Power of Reverſing Erroneous (or *Falſa*) unjuſt Judgments of all other Courts

Bracton *fol.* 3.

Fleta l. 2. fo. 66.

Courts was in the Juſtices that followed the King, and his Court being thereunto Authoriz'd by the King; but if they had Err'd, the Error was to be Rectified by his Councel or ſpecial Auditors, ſuch as the King ſhould think fit, or by the King himſelf, the ſupreme Juriſdiction and *Dernier* reſort being in the King himſelf, or where he pleaſed to place it, Car ceo reſervons nous eſpecialment a noſtre Juriſdiction.

And this is alſo declar'd to be ſo by Act of Parliament in the 52 of *H.* 3. *cap.* 10. which ordains, That noue from thencefoyth, except our Loyd the King ſhall hold in his Court any plea of falſe Judgments given in the Court of his Tennants, for ſuch Plea eſpecially belongeth to the Crown and Dignity of our Loyd the King.

Though the Supream Juriſdiction were in the King to uſe as he ſaw beſt, it is but rational that if the Parliament were ſitting at ſuch time

as any Complaints were made to him of any Erroneous Judgment or Decree, that he ſhould refer the Examination and final Determination of the matter to the Houſe of Lords, who without any manner of doubt, are, and always were, the fitteſt Referrees the King could refer any matter to be determin'd, they being the chief Aſſembly of the Honour, Integrity, Wiſdom and Juſtice of the Nation, and therefore it is but reaſonable the King ſhould take the meaſures of his final Determination from their Advice, or refer it to them to determine, which is all one, Better or Abler Adviſors being not to be found; but it is as true they had no power of Judging by their own innate Authority, but by a delegated Authority from the Kings, as plainly appears by what is ſaid before, and alſo by the Parliament Roll of the 4 of *Ed.* 3. which is recited in *Cotton's* Records, *In hæc Verba*, viz. *The Treaſons, Felonies, and*

other

other miſdemeanors of Roger Mortimer *are particularly repeated, a great part of which* Roll *cannot be read, for that the* Roll is *mouldred; but in the end it appears, that the King charg'd the Lords and Peers, who as Judges of the Realm by the Kings Aſſent, adjudged that the ſaid* Roger *ſhould be Drawn and Hang'd:* Whereby it appears it is the Kings Charge to the Lords, and the Kings Aſſent that gives them Juriſdiction and Authority: And ſo it follows of neceſſary conſequence, that though they are the fitteſt for the King to Authorize to determine the miſtakes and Errors of his Chancellors and other Judges; yet, if when they are not Aſſembled in a Parliamentary way, there is no reaſon nor authority againſt it, nor inconveniency by it, for the King to Authorize a convenient number of the Lords of the Parliament and Judges that are near him to take courſe with Erroneous Decrees in the mean time until the Parliament

liament ſits; And therefore it was that it was provided by Act of Parliament the 31ſt. of *Ed.* 3. *cap.* 12. That the Lord Chancellor and Treaſurer ſhould have Power upon Complaint to take the Juſtices, and ſuch other ſage perſons as they thought fit, to their Aſſiſtance, and to Examine the Judgments of the Exchequer Court. And if any Error be found, they may correct the Rolls, and after ſend them into the Exchequer to make thereof Execution: Which thing I conceive the King might have done of himſelf without Act of Parliament; and I conceive the Act made it a ſtanding Rule to prevent often troubling the King upon every particular occaſion; and though there be no proviſion by that Act for any further Examination of the Judgment of the Chancellor and Treaſurer in that Caſe; yet it is not ſo final, but the King may upon Petition to him, order a Writ of Error re-

returnable in the Houſe of Lords Aſſembled in Parliament for a further and more due Examination of the matter if either Party thinks himſelf agrieved thereby, and from that time forward, *viz.* the 31 of *Ed.* 3. there was no ſtanding Order made by Act of Parliament, as to the Errors of the Court of *Kings-Bench*, for by that Name I ſhall now call the Succeſſors of the Judges that followed the King mentioned in the aforeſaid Authors, but it ſtood at the Kings meer pleaſure, as formerly, until the 27 of Queen *Elizabeth*: Yet our latter Kings before that Statute, for the moſt part uſed to refer the Examination and Correction of ſuch Errors only to their Houſe of Lords in Parliament, inſomuch that for want of oftener referring it to their Councel, or to *Specialibus Auditoribus*, Special Commiſſioners, as *Fleta* affirms the King could do, as is mention'd in the beginning of this Section; it grew to

27 *El.* 8.

be

be an Opinion, that Errors of the Court of *Kings Bench* could be rectified no where but in Parliament, as appears by the Preamble of that Statute of the 27 of *Eliz.* Therefore and as the Preamble of that Statute mentions, Because the Court of Parliament was not in those days so often held as in ancient time; and because in respect of the great Affairs of the Realm, such Erroneous Judgments, (meaning those of the *Kings Bench*) could not be well consider'd and determin'd in time of Parliament; whereby the Subjects of the Realm were greatly hindred and delayed of Justice. It was therefore enacted, That the Errors of Judgments in the said Court of Kings-Bench in certain Actions therein mention'd, should be examined and rectified in the Exchequer-Chamber by such persons as in the said Act is mentioned; and after the Judgment is affirmed or reversed, the Record, and all things con-

concerning the ſame, ſhall be removed and brought back into the Court of Kings-Bench, that ſuch further proceedings may be thereupon, as well for execution as otherwiſe, as ſhall appertain. And thereby it is reſerv'd, That the parties ſhall not be finally concluded by ſuch Reverſal or Affirmation, but that they may ſue in the high Court of Parliament for a further and more due examination of the ſaid Judgment, in ſuch ſort as was theretofore uſed upon erroneous Judgments: And the manner theretofore was, that before any Writ of Error could be brought to examine and correct Errors in Parliament, a Petition was to be preferred to the King for allowance thereof, and it was to be allowed by the King before any ſuch Writ of Error could be made, as appears by the Authorities in the margin; which makes it moſt plain *where* & in *whom*

1 *H.* 7. fo. 19, 20. *Dy.* fo. 375.

the

the Supreme Judicative Power lay. And Judge *Jenkins* says, *The reason of the Law, and the King's allowance of a Writ of Error, returnable in the House of Lords, is, for that the Judges of the Land, all of them being of the Kings Councel, and the twelve Masters in Chancery, assist in the Lords House, by whose advice erroneous Judgments are redrest*: So that it appears plainly, their Judicative Power in that particular is not originally and fundamentally in themselves, but derived from the King, by his allowance thereof, who is *fons & origo Justitiæ*; and, says *Bracton*, *est enim Coronæ Regis facere Justitiam & Judicium & tenere pacem sine quibus Corona consistere non potest nec tenere, hujusmodi autem jura sive Jurisdictiones ad personas sive tenementa transferri non poterunt nec per privata persona possideri nec usus nec executio Juris, nisi hoc datum fuerit ei de*

Jenk. Lex terræ, fo. 55.

Bract. lib. 2. cap. 4.

de ſuper ſicut Juriſdictio delegata non delegari poterit quin Ordinaria remaneat cum ipſo Rege. And I find by the Journal of the Lords Houſe, that the 10*th.* of *December* 1621. a Report was made by a Committee appointed to ſearch for Precedents touching Appeals to the Lords from Decrees in Chancery, *That anciently all Petitions of that nature were directed to the K. and his great Councel.* From whence I gather, it is but a late practice, both to leave the King quite out of ſuch Petitions, and to neglect praying his allowance, that the Lords may examine Errors of Judgements and Decrees; And perhaps it may prove of ill conſequence hereafter, if not timely conſidered and rectified: the Supremacy of Juriſdiction being the Supreme part of Government, & the King's chiefeſt Dignity.

In the *Stat.* 37 *E.* 3. 18. by *Gr. Councel* is meant the *Privy-Council*

Mir. 232.

By the foreſaid Statutes of *E.* 3. and *El.* and ſome others ſince made, there

there is ſufficient proviſions againſt erroneous Judgments in all Courts at Law in the intervals of Parliament, by Writs of Error, which are in nature of Appeals; which courſe (I conceive) the King might have taken, if no ſuch Act had been made: But againſt the Judgments and Decrees of the Courts of Equity in *Chancery*, *Exchequer-Chamber* and *Counties Palatine*, *&c.* there is no proviſion at all by any Parliamentary Act; that matter ſtanding as it did by the Common-Law, no Parliament having intermeddled with it; which if they had, they had the ſame reaſon, or more, to deſire the King to conſtitute a Court of Appeal from theſe Courts of Equity, as from other Courts. And it is a great Argument with me, (if there were no other) that it was conceived by the Parliament, that there is a Power in the King alone out of Parliament-time to rectifie the Errors of the Decrees of all Courts of Equity, elſe the Parliament

ment, I presume, would have taken care to have provided against those, as well as against the Errors of the Court of *Kings-Bench*; which provision was made, because they conceived those Errors not to be redressed but in Parliament; and the same reason that induced the Parliament to constitute Courts to redress the Errors of the *Kings-Bench* and *Exchequer*, *viz.* the unfrequency of Parliaments, and their being otherwise employ'd when they sit, may induce the King to appoint Referrees to rectifie Chancery-Decrees.

For the further clearing of this matter, it seems in Queen *Elizabeths* time there was the like doubt made as now, *Whether the Queen might relieve against the mistakes of the* Chancellor *or* Keeper, *in making his Decrees?* And the Queen took the right way to be inform'd, she referr'd it to the Judges, to certifie to her their Opinion touching that matter: For it appears, *Rolls* Rep. 1 p. 131. by the Authority in the

Margin, that it was certified by all the Judges of *England*, in the Cause between the Countess of *Southampton* and the Earl of *Worcester* in *Chancery*, that the Queen, upon Petition, might refer the matter to the Judges (but not to others) to examine and reverse the Decree, if there should be cause; and that the then Lord Chancellor agreed to that resolution. And forasmuch as it is mentioned in that Report, that the reference ought to be to the Judges, and not to others: it is to be understood, that it was a point in Law was then in dispute, and in such Cases there must be some Judges amongst them; for, *in arte sua cuiq; credendum est*; and therefore Judges (whose profession the study of the Law is) are presum'd to be best consonant of any what the Law is; and the Law is not to be unregarded in judging according to Equity, but both Law and Conscience are to be so intermix'd, as to produce a just Judgment;

ment; a skill of great curiosity, and ought therefore not to be final, but in the resolution of several men of great knowledge and integrity, since the least byas of affection or disgust to one side or other, may lead any single man a great way out of the way.

I presume this may be the meaning of that Report, because I find in the Year-book of the 27*th.* of *H.* 8. fo. 15, *&c.* That the Kings Secretary and Mr. *Fitz-Herbert* were join'd with the Chancellor to review a Decree between the Prior of St. *Johns* and one *Dockeray*, where the Secretary gave rules in the Cause as well as the Chancellor.

The House of Lords themselves always take the advice of the Judges; and to leave matters of Equity wholly to the Chancellor alone in the intervals of Parliament, is to give him a greater power than the Lords take to themselves in Parliament; which, I humbly conceive, ought not to be.

Beſides this reſolution of all the Judges, aſſented to by the then Lord Chancellor, it was afterwards agreed to by the Houſe of Lords themſelves, That it was proper for the King to give authority to examine and correct Decrees in Chancery, as appears by their own Order, which is as followeth, *viz.*

Die Veneris *viceſimo octavo die* Maii, 1624.

THe Petition of Will. Matthews *of* Landaff *was read, and the Anſwer thereunto conceiv'd by the Lords Committees for Petitions (after Councel heard on both ſides many ſeveral days) was reported to the Houſe by the Lord* Houghton, *and read,* in hæc verba, *viz.*

The Lords Committees upon the examination of the whole Cauſe between *William* and *George Matthews*, find *William Matthews* principal Debt to be Five thouſand two hundred and ſixty pounds, which they hold

hold fit to be paid by the ſaid *George Matthews* thus:

Upon St. Andrews *day next, One thouſand ſix hundred twenty four,* 2000 l.
Upon St. Andrews *day, One thouſand ſix hundred twenty five,* 2000 l.
Upon St. Andrews *day, One thouſand ſix hundred twenty ſix,* 1260 l.
The whole ſum, 5260 l.

And that for ſecurity for the payment of this Debt according to every ſeveral day and payment here ſet down, the whole Land to ſtand bound; and that this be the better performed, the Lords Committees think fit the execution hereof be recommended to the Court of *Chancery.*

Die Veneris *viceſimo octavo die* Maii, 1624. *poſt meridiem.*

George Matthews exhibited his Petition, *in hæc verba,* viz.

To the Right Honourable the Lords Spiritual and Temporal, in the higher House of Parliament assembled.

The humble Petition of *George Matthews*, Esq;

Humbly sheweth your Lordships,

THat your Petitioners Decree now *question'd, hath been several times submitted unto by* William Matthews, *never question'd during the life of the Petitioners Father; and His Majesty, upon information by Petition on both sides, declared,* That he saw no Cause for questioning thereof; *and it was thereupon ordered,* That to hear a Cause after submission, (no Corruption appearing) would be a dangerous Precedent. *In consideration whereof, and for that the Decree stands question'd only by Petition, nor was your now Petitioner ever party to any Suit,*

Suit, nor is there any Bill depending in Court; he being informed by Counsel, that it hath been the course of this Honourable House to reverse Decrees but by Bill legally exhibited, especially where no corruption is prov'd:

He therefore most humbly beseecheth, That he may have the liberty of a Subject, and that he may not be concluded, and a Decree submitted unto overthrown, and the small remainder of his ancient Inheritance taken from him, by Order of this Honourable House, only upon a Petition. He most humbly submits himself herein to your Lordships, and will ever pray for your Honourable preservation.

This Petition being read and considered of, these Lords, (*viz.*) the Earl of *Montgomery*, the Lord Bishop of *Durham*, the Lord *Say and Seal*, and the Lord *Denny*, were appointed

by the Houſe to ſet down an Order in this Cauſe between *William* and *George Matthews*.

Die Sabbati, *viceſimo nono die* Maii, 1624.

THe *Lords Committees appointed yeſterday in the afternoon to ſet down an Order in the Cauſe between* William *and* George Matthews, *reported the ſame to the Houſe* in hæc verba, *viz.*

THe Lords of Parliament do order, That the Cauſe depending between *Will. Matthews* and *George Matthews*, ſhall be reviewed in *Chancery* by the Lord Keeper, aſſiſted by ſuch of the Lords of Parliament as ſhall be nominated by the Houſe, and by any two of the Judges whom the Lord Keeper ſhall name; for

for which end the Lord Keeper is to be an humble Suitor unto his Majeſty from the Houſe, for a Commiſſion unto himſelf and the Lords that ſhall be named by the Houſe, for the ſaid Review and final Determination of the Cauſe, as to them ſhall appear Juſt and Equal: And this the Lords deſire may be done with all convenient ſpeed.

The which Order being read, the Houſe approved thereof, and theſe Lords were named by the Houſe to be joyn'd in the ſaid Commiſſion with the Lord Keeper, viz. *the Lord Chamberlain, the Earl of* Montgomery, *the Earl of* Bridgwater, *the Lord Biſhop of* Durham, *the Lord Biſhop of* Rocheſter, *the Lord* Denny, *and the Lord* Houghton; *and the Houſe ordered the ſame Cauſe to be heard and determined*

minds accordingly in the beginning of the next Michaelmas Term.

This agrees *verbatim* with the Records of the Lords House; and pursuant thereunto, the matter was review'd by these Commissioners, and a Decree by them made in reversal of the Chancery-Decree, as appears by the Registers Book of Orders in *Chancery*, of *Michaelmas* and *Hillary Term* in the 22*d.* year of King *James*.

Sir *Edward Cooke*, in his Jurisdiction of Courts, Title *Chancery*, with great approbation reports several Cases of Decrees in Chancery referred to the Judges by Queen *Elizabeth*, to be examined and amended; and it is to be noted, that his authority in that Case was sevenfold; for when he wrote that Book, he was very much incens'd against the King for being put out of his Chief Justiceship, and set himself as much as he could against the

Anderson 2 part 163. to the same effect.

Prero-

Prerogative, as appears by the whole current of that Book; so that had there been any colour of denying the Queen this Power, he had never cited those Cases without Objections.

It was not only practiced by Qu. *Elizabeth* and King *James*, but also by King *Charles* the first, as appears by an Order which I find in the said Registers Office in the Book of Entry of Orders there of the 22*d.* of *November*, in the 7*th.* year of King *Charles* the first, between one *Sherbourn*, the Executor of one *Munford*, the Executor of one *Challener*, Plaintiff, and one *Townley* and *Forrest* Defendants; which begins thus:

The matter upon his Majesties reference to the Right Honourable the Lord Keeper, upon the humble Petition of the said Townley, *coming this day to be heard in the presence of Council learned on both sides, before his Lordship, being assisted by Mr. Justice* Hutton,

Hutton, *Mr. Juſtice* Jones, *Mr. Juſtice* Whitlock, *and Mr. Juſtice* Harvey, *the Queſtion appear'd to be*, Whether, or how far, the ſaid *Townley* ought to be bound by the Decree made on the behalf of the ſaid *Munford* for the ſum of 17000 *l.* againſt the Defendant *Townley*, in Caſe the Defendant *Thomas Forreſt* ſhould not pay the ſame? *And upon the hearing, a Bill of Review was ordered to be brought by* Townley, *either upon matter not inſiſted on at the firſt hearing, or new matter, and according to the courſe of the Court, the ſaid* Townley *was ordered to give ſecurity, and in the mean time the execution of the ſaid Decree, and all proceedings thereupon, as againſt the ſaid* Townley, *was reſpited and ſuſpended; and whereas by the firſt Decree* Townley *was decreed to pay as well what his Co-Truſtee* Forreſt *had received of the Profits of the Eſtate of* Challener, *as what he had received himſelf: Upon the hearing upon the ſaid Bill of Review,*

Review, the first Decree was revers'd, and Townley *decreed to answer only so much as he himself had received, which appear'd by the proofs to be but three half years Rent, and it was referred to a Master in Chancery to audit the account touching the three half-years Rent, and the Recognizance given by* Townley *to perform the Order of the Court, was discharged.*

In the same Registers Office I find another Entry of an Order of *June* 1. in the 12*th.* year of King *Charles* the first, between one *Pennington* and others Plaintiffs, and one *Holmes* Defendant, in these words:

WHereas, upon Petition exhibited to the Kings most Excellent Majesty by the Defendant, supposing some injustice and wrong to have been done unto him by a Decree made in this Court between the foresaid parties, his Majesty was most graciously pleased to refer the matter to the Master

Master of the Rolls, to call to his assistance one of the Judges of the Bench, and to hear what could be alledged against the said Decree: And this day being appointed for the hearing of the matter, the Master of the Rolls calling to him Mr. Justice Crooke, and having heard the parties and their Councel on both sides, and what could be alledged against the said Decree, why the same should not be put in execution, saw no cause to recede from, or alter the same.

Now, after the Opinion of all the Judges of *England*, assented to by the then Lord Chancellor for the legality of this sort of proceeding, and the approbation of the House of Lords, and their direction for humble Suit to be made to the King for a Commission from Him to proceed accordingly; and after so continu'd a series of practice for the Reign of Three of the best Princes that ever sway'd a Scepter, without the least Ob-

Objection then made againſt it by any, that I ever read or heard of: I ſay, after all this, ſure one would think there could be no room for any colour of illegality in that ſort of Proceeding.

But it is objected, That the Power and Right of this ſort of proceeding is ſince taken away by the Statute of 16 *Car.* 1. cap. 10. But I hold, that Statute doth not do it in the leaſt, nor doth it carry in it the leaſt colour or look that way; though, indeed, it doth take away ſomewhat too much (as I conceive) of the King's Power, but not this of *referring the examination and correcting of erroneous and unjuſt Decrees in Chancery to fit perſons for that purpoſe.* I am ſure, 'tis not prohibited by that Statute by any particular words, nor are there any general words therein contain'd, that according to the rules of Law, and conſtruction of other Statutes, can be conſtrued to extend to the taking away of that courſe of pro-

proceeding. For the clearing of which point, it is requiſite that the Statute ſhould be taken ſtrictly into conſideration; the prohibiting part whereof is as followeth:

Be it Ordained and Enacted by the Authority of this preſent Parliament, That the ſaid Court, commonly called the Star-Chamber, and all Juriſdiction, Power and Authority belonging to or exerciſed in the ſame Court, or by any Judges, Officers and Miniſters thereof, be from the firſt day of Auguſt 1641. clearly and abſolutely diſſolved, taken away and determined; and that from the ſaid firſt day of Auguſt, neither the Lord Chancellor, nor the Keeper of the Great Seal of England, the Lord Treaſurer of England, the Keeper of the Kings Privy-Seal, or Preſident of the Councel, nor any Biſhop, Temporal Lord, Privy-Councellor, Judge or Juſtice whatſoever, ſhall have any Power or Authority to hear, examine or determine any matter or thing whatſoever, in the ſaid Court commonly called

led the Star-Chamber, or to make, pronounce, or deliver any Judgment, Sentence, Order or Decree, or do any Judicial or Miniſterial act in the ſaid Court: and all and every Article, Clauſe and Sentence in them and every of them, by which any Juriſdiction, Power or Authority is given, limited, and appointed unto the ſaid Court commonly called the Star-Chamber, or unto all or any the Judges, Officers, or Miniſters thereof, or for any proceedings to be had or made in the ſaid Court, or for any matter or thing to be drawn into queſtion, examined or determined there, ſhall, for ſo much as concerneth the ſaid Court of Star-Chamber, and the Power and Authority thereby given unto it, be from the ſaid firſt day of Auguſt repealed, and abſolutely revoked and made void.

And be it likewiſe Enacted, That the like Juriſdiction now uſed and exerciſed in the Court before the Preſident and Counceil in the Marches of Wales, and alſo before the Preſident and Counceil eſtabliſhed in the Northern-parts, and alſo in the Court

commonly called the Court of the Dutchy of Lancaster, before the Chancellor, and Councel of that Court; and also in the Court of Exchequer of the County-Palatine of Chester, held before the Chamberlain and Councel of that Court, the like Jurisdiction being exercised there, shall from the first day of August 1641. be also repealed and absolutely revoked and made void, any Law, Prescription, Custom, or Usage, &c. to the contrary thereof in any wise notwithstanding; and that from thenceforth no Court, Councel, or place of Judicature shall be erected, ordained, constituted, or appointed, within the Realm of England or Dominion of Wales, which shall have, use, or exercise the same or the like Jurisdiction as is or hath been used, practiced or exercised in the said Court of Star-Chamber.

Be it likewise Declared and Enacted by the Authority of this present Parliament, That neither His Majesty nor His Privy Councel have or ought to have any Jurisdiction, Power and Authority, by English Bill, Petition, Article, Libel, or any

any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the Lands, Tenements, Hereditaments, Goods or Chattels of any of the Subjects of this Realm; but that the same ought to be tryed and determined in the ordinary Courts of Justice, and by the ordinary course of Law.

These are all the prohibitory words of that Statute. I will not say any thing of the reasonableness or unreasonableness of it, but that it was made in 41. But taking it as it is, I think it deserves no further construction to disable the King from performing his Oath, that is, *to see that Justice should be done to his Subjects*, than the very express words will bear; and for the right understanding of it, it is to be considered in all the parts thereof, without relying on any one single Clause alone, and thereby it will appear how far the whole may be construed to take

away any Power that was before in the King.

It takes away the *Star-Chamber* and the Power thereof, and prohibits the erecting of any Court of the like Jurisdiction, by expreſs terms; but by ſo doing it meddles not with this Power of the Kings to refer the examination of an unjuſt Decree made in Chancery by One man, to Three or Four, or more men, fit for the purpoſe, neither in terms nor in conſtruction: And it is a great argument that it was never intended to be taken away by that Act, becauſe it is not taken away by expreſs words; for if it had been intended to have been taken away, it might have been expreſs'd by particular words, it being no new invention ſince the making of that Act, but a courſe long practis'd before that Act was made, as appears by what is aforeſaid, and that without the leaſt contradiction, but on the contrary, with the greateſt approbation that could

could be, *viz.* the approbation and direction of the Lords Houſe in Parliament at one time, and of all the Judges of *England* at another time, as is aforeſaid, and of all the great Writers of the Law of thoſe times; ſo that there was then no apparent reaſon for taking it away.

The next part of the Statute, and that which ſeems moſt to oppoſe me, is, *That the King nor His Privy-Councel have, or ought to have, any Juriſdiction, Power or Authority, by* Engliſh *Bill, Petition, Article, Libel, or any other arbitrary way, to examine, draw into queſtion, determine, or diſpoſe of the Lands, Tenements,* &c. *but that the ſame ought to be tryed and determined in the ordinary Courts of Juſtice, and by the ordinary courſe of Law.*

For the underſtanding of this, it is to be remembred, the King, for the execution of the Law, had two ſorts of Powers in Him by the Common-Law; He had Power and Au-

Ordinaria Jurisdictio pertinet ad Regem, Bract. fol. 108, 412. *Ordinaria Jurisdictio remanet cum ipso Rege*, Bract. fol. 55.

thority in Person to hear, determine, and dispose of the Estates of his Subjects, upon Controversie arising between them, and complain'd of to him, and this is properly called *Jurisdiction*; and he had also *designatio Judiciorum*, a power of nominating and appointing Judges under him to hear, determine, and dispose of the Estates of the Subjects, touching which any Controversie did arise, and was brought before them to be decided, as appears in the beginning of this Treatise; So that if he should be excluded himself by this Statute from hearing and determining in person, yet there is not a word that excludes him from nominating Judges to hear and determine: Therefore, if he could nominate Referrees to rectifie a Chancery-

Designatio Justiciariorum est à Rege Jurisdictio vero ordinaria à Lege, Co. 4 Inst. fo. 74.

Sect. 2. per tout.

Chancery-Decree before the Statute, as most apparently he could, he may do so, yet, there being not one word in the Statute that prohibits it. And whereas it prohibits all arbitrary ways whatsoever of disposition of the Subjects Estates by the King or his Privy-Councel, this course is not to promote Arbitraryness, but to prevent it; for it is more arbitrary to leave Causes to the final determination of one single mans Judgment, than to refer it to the Judgment of five or six, it being not so easie to corrupt or deceive many as one, and that is the reason why a Tryal by Jury of Twelve is so much approv'd of, and applauded; for they being many, cannot all be easily corrupted. *Fortescue* fol. 75.

And as to that part of the Act that says, *The fore-mentioned Estates ought to be tryed and determined in the ordinary Courts of Justice, and by the ordinary course of Law*: certainly none can say that have considered the pre-

misses, but that referring the examination of Chancery-Decrees to a convenient number of sage persons, as is aforesaid, may very well be accounted a proceeding in Chancery according to the ordinary course of that Court, since the first practice of the Court was to determine not by the Chancellor alone, but by the consent of divers others as is aforesaid. And I conceive the House of Lords terming it *a reviewing of the Decree in Chancery*, when they directed application to be made to the King for a Commission, as is afore-mentioned, and all the Judges of *England* giving their Opinion for the legality of such proceeding, and the same consented and agreed to by the then Lord Chancellor, and the long continued practice of it without any dislike, (when there was occasion) as I have made appear for several Princes Reigns, and until an unparallell'd Rebellion and Usurpation, put that (as well as all

Sect. 3.

all things else) out of course; may intitle it to *an ordinary course of proceeding*, if any proceeding at all in Equity in Chancery can be so accounted; and the determining Causes there by the Chancellor himself, without any assistance or consent of others, is more like an arbitrary and an extraordinary way, and new sort of practice, than that.

For further manifestation of this matter, and that a reference from the King to examine the injustice of a Chancery-Decree is a proceeding in Chancery, and no erecting of a new Court, and that as well when the Lord Chancellor or Lord Keeper is not one of the Referrees or Commissioners, as when he is, it appears by the proceeding upon the fore-mentioned Reference by the King to the Master of the *Rolls* and a Judge of the *Kings-Bench*, to examine the injustice of the Decree between *Pennington* and *Holmes* afore-mentioned: That upon that reference, the proce-

proceedings on the first Decree was staid, and what was done thereupon is entred among the proceedings in *Chancery*, as an Act of that Court; And moreover, it cannot be deny'd but the King may commit the custody of his Great Seal to several Commissioners, as King *James* did upon the outing of the corrupt Lord *Bacon*; and in such cases one of the Commissioners keeps the Seal, and is President amongst the rest, but they have all equal Authority in judging according to the purport of the Commission, *and do sign Decrees; and if the King may make many Judges in Equity to hear

Dugd. Orig. Ju. fol. 32. That *Esheldred* appointed the Office of Chancellor to be exercis'd by three *Abbots* by turns.

See the Parliament Roll of that time, and *Dugd.* Chronological Table of Chancellors and Keepers.

*12 *Maii* 1676. ordered in *Chancery, inter Butler* and *Eliot*, That the Decree made by the Lord *Bacon* should not be signed by the Commissioners of the Great Seal, until notice to the other side, as by the Registers Book of Orders in Chancery of that day appears.

all

all Cauſes generally, what is the reaſon he cannot appoint many Judges there in ſome few particular Cauſes, upon complaint of miſtake by his Chancellor or Keeper? ſince he that may do more can do leſs, and the King is not ty'd to have any certain or limited number of Judges in his Courts; for there were in the *Common-Pleas*, in *E.* 4.'s time and before, ſometimes 6, 7, or 8, and King *James* had five Judges in the *Kings-Bench*, (whereof my Great-grand-father Sir *David Williams* was the fifth) and as many in the *Common-pleas*, about the beginning of his Reign, as may appear by *Dugdale*'s Chronological Table of Judges of that time: So that I cannot apprehend any manner of prohibition, neither expreſs nor implied, in this Statute nor any other, againſt the Kings referring the examination and regulating unjuſt Decrees in Chancery to others, beſides the Chancellor or Keeper.

This

This Statute deserves not to be extended beyond it self, it being a penal Statute, which is never to be taken by Intendment, further then the very expreſs words of the Prohibition upon a ſtrict and bare conſtruction will bear, however the Statute it ſelf in the concluſion hath by expreſs words ſomewhat mended the matter from what is contain'd in the premiſſes; for in the end of the Act there is a Proviſoe which doth in effect reſtore the King to almoſt all his Ancient Juriſdiction, and puts all the ſeeming Cauſe of doubt about the matter of Referring the Examination of unjuſt Decrees in Courts of Equity quite out of doors, by confining the meaning and conſtruction of the Statute to the words of the Proviſoe therein contained, which Proviſoe is in theſe words, Provided always, and be it Enacted, that this Act and the ſeveral Clauſes therein contain'd, ſhall be taken and Expounded to extend

extend only to the Court of Star-chamber, and the said Court holden before the President and Councel in the Marches of Wales, and before the President and Councel in the Northern parts, and also to the Court commonly call'd, the Court of the Dutchy of Lancaster, holden before the Chancellor and Councel of that Court; and also in the Exchequer of the County Palatine of Chester, before the Chamberlain and Councel of that Court, and to all Courts of like Jurisdiction to be hereafter Erected, Ordain'd, constituted or appointed as aforesaid, and to the Warrants and Directions of the Council-board, and to the Committments, Restraints and Imprisonments of any person or persons made, commanded and awarded by the Kings Majesty, his Heirs and Successors in their own Persons, or by the Lords and others of the Priv-Council and every one

of

of them. So that here's an Explanation that no Court or Proceeding in any Court is to be taken away but the Court of *Starchamber* and the Jurisdiction thereof, and such like Courts of like Jurisdiction; and this of the Kings referring the Examination of unjust Decrees in *Chancery* to particular Commissioners and Referrees, was practis'd out of the *Star-chamber*, when that Court was at height, as may appear by the forecited Presidents; so that it never was a part of the Jurisdiction or practice of that Court, and therefore declared by the said Proviso not intended to be prohibited by the said Act; and as to the King the Proviso says, He is to be restrained but from restraining and imprisoning by his own personal command, he may do every thing else that he could have done before; He may hear and determine in person, if he pleases, as he could have done before; and he may appoint all such

Judges

Judges or Referrees to all purpoſes, as he could have done before: But as to the Warrants of Impriſoning, if any cauſe for ſuch there ſhould be, he is to leave that to his Miniſters; and the King, if he thinks fit, upon complaint to him made of Injuſtice or other Error done by his Chancellor or Keeper, may order his Chancellor to order the parties concern'd to appear before the King in perſon, and the King himſelf may require his Chancellor or Keeper to be preſent, and his Majeſty may call others to his aſſiſtance, whom he may confide in for juſt and equitable advice, and may determine what to him ſeems meet in the Cauſe, upon conference with them, this being for *advancement*, not *delay* of Juſtice; and if the Chancellor or Keeper doth not uſe the coercive part of Impriſonment, and other Proceſs of the Court of Chancery to compel Obedience to ſuch determination, I conceive he doth not do his duty. I

mention

mention this, not that I think it's absolutely necessary the King should trouble himself to hear all matters in person, but I humbly conceive it not amiss for his Majesty sometimes to use his Power in Chancery as well as at Council-board, lest for want of using his Power, he may be in danger of losing it, and consequently his esteem in the eyes of the people, may be lessen'd; whilst every of his acting Judges (the Chancellor or Keeper especially) command respect from their Friends, and fear and trembling from their Enemies.

I am sure *Solomon*'s giving Judgment in the case of the Harlots gain'd him more esteem, not only amongst his own Subjects, but all the World over, than any one other act of Government he did in all his Reign, and the Kings not being exactly skill'd in the Law, or the formal Rules thereof, as a profess'd Lawyer should be, should not at all hinder his undertaking it sometimes; for a man but

of

of common ſenſe, having heard the Caſe put, the proofs made, and the Arguments of indifferent men, (not byaſs'd Advocates, or Councel only) may eaſily diſcern what Judgment is fit to be given in Equitable Cauſes; and the King hath almoſt infallible helps; He hath his Lords Spiritual and Temporal; He hath always at his call twelve Judges, men skill'd in the Laws, and ſworn lawfully to counſel the King in all matters: Theſe, or ſome of them, he may command to attend him at ſuch Hearings, and may command them to give their opinion of the matter, according to the nature of the Cauſe, and according to the beſt of their judgments; and the King at ſuch hearing may give, or cauſe to be giv'n a Sentence or Judgment according to the Opinion of the majority of them; and this courſe is the beſt, and was the old way of judging of Equity; and if us'd ſome times, would make Chancellors and Keepers more

regard what they do: But if the King ſhould not be minded to meddle in perſon with determining any Cauſes, his referring of the examination of Chancery-Decrees to perſons fit and able, of judgment and knowledge to do it, may ſuffice, better then to leave it wholly to his Chancellors ſingle judgment; For, *ſecurius expediuntur negotia commiſſa pluribus, & plus vident oculi quam oculus.*

There is at this day a ſtanding Commiſſion enroll'd in Chancery to all the Judges of *Weſtminſter hall*, the Maſter of the Rolls, and the other Maſters in Chancery, impowering any Three of them, (whereof the Maſter of the Rolls or one of the Judges to be one) in the abſence of the Lord Keeper to hear and determine Cauſes, and that is not thought to be prohibited by any Statute: And if the King hath Authority and Power to appoint Commiſſioners for the Chancellor or Keepers eaſe, why

cannot

cannot he also give power to Commissioners to rectifie his Decrees when he mistakes?

The Chancellor or Keeper of the Great Seal is but the King's Deputy during pleasure, 9 *Rep.* 99. and a Grant of that Office for life is void, *Cooke* 4 Inst. fol. 87.

Upon the whole matter, I must conclude, I can apprehend no warrantable objection can be made against this sort of proceeding, or that any Statute doth, or intended to take it away: so that I shall take that point for granted, *That it is very lawful for the King to appoint Referrees or Commissioners to rectifie Chancery Decrees, or Decrees of any other Court of Equity.*

The next thing to be considered is, Whether any of the King's Privy-Council may be Referrees or Commissioners for that purpose, notwithstanding the said Statute? For they are men of so great Honour, Knowledge and Integrity, and of such Fortune and Estates, as to scorn Bribery, and therefore very fit to assist in

this matter; and I hold *They may*; for the prohibition of the Act extends to their not acting as being only and barely Privy-Councellors: It doth not say, *Privy-Councellors shall not act by virtue of any other Authority.* And this thing proves it self plainly in the Case of the now Lord Keeper, and Lord Chief Justice of the *Common-Pleas*, who are both of the Privy-Council, yet examine, draw into question, determine and dispose of the Lands, Tenements, Goods and Chattels of the Subjects, with a witness, by virtue of another Authority derived from the King; and if They may do it, why may not any other of the Privy-Council act by a lawful Authority in those matters, as well as They?

The next thing considerable, is, if the Lord Chancellor or Keeper ought to command performance according to the course of the Chancery, of what such Referrees do order by virtue of such Reference, when

when he himself is not one of them, as well as when he is; and I hold *he ought*; First, for whatever Order is made in the House of Lords upon determining an Appeal from Chancery-Decrees, it is sent to the Chancery, to compel Obedience thereto; and in this respect, I conceive the House of Lords are but the Kings Referrees, and do legally and truly derive their Authority from the King, as is prov'd by the due Proceedings upon Writs of Error, and the ancient form of Petitions against Chancery-Decrees before-mentioned: So that such Referrees do act by Authority derived from the King, as well as the House of Lords in Parliament. And further, the practice hath been for the Lord Chancellor or Keeper to pursue what is done by such Referrees; for what was resolved by the Judges upon the References mentioned in Sir *Edw. Cooke* 4 Institutes, and certified by them to the

Chancellor was comply'd with by him; and what was decreed by the major part of the Commissioners joyn'd with the Lord Keeper, in the Case of *Matthews* and *Matthews* before-remembred, was confirmed, and prosecuted by the Lord Keeper, as Lord Keeper, in and according to the course of Chancery; and so in the case of *Sherburne* and *Townley*; and had been so also in the case of *Pennington* and *Holmes* before-mentioned, if there had been any alteration of the Decree; for the confirmation of that Decree by virtue of the Kings referrence, is entred as an Act of that Court: so that I think that point is also pretty clear. And (I presume) the enrolling or performing of a Decree, before Petition to the King, or before obtaining his Commission or Order of referrence, (which are both as sufficient one as the other, there being a sufficient number of Precedents of both sorts) is no hindrance but that restitution may be awarded,

if

if the Commiſſioners and Referrees make certificate to the Chancellor or Keeper that it ought to be ſo; for the enrollment of a Decree doth not make it more irrevocable then it was before the enrollment, but that notwithſtanding it may be altered in the ſame Court; for it is not a Record, and in that reſpect not ſo high in the eye of the Law as a Judgment according to the courſe of the Common-Law, which cannot be revers'd in the ſame Court; and this was ſo held in *H.* 8.'s time, in a Cauſe in Chancery before mentioned in the *6th.* Section, between the Prior of St. *Johns* and one *Dockeray*; where upon a review in Chancery before the Lord Chancellor, the King's Secretery, and Mr. *Fitz-Herbert*, it was held and allowed, that a Decree there is but an Order made by the Court for the time; which upon good conſideration, and cauſe ſhewn, may well be altered,

27 *H.* 8. fol. 15.

notwithstanding all the arguments then made by the Councel for the first Decree, to prevent inspecting into it, as that such looking back tended to confusion, and would make Causes endless, and the like: whereunto the Kings Secretary (sitting then in equal authority with the Chancellor, as appears by the Report) made answer, and commanded the formal man that was against inspecting the injustice of the Decree to forbear disputing the Power of that Court; and such was the practice of the late Lord Chancellor *Nottingham*, who would often rehear and re-hear again and again, upon Councels certifying it under their hands that there was good Cause, as they appre-

The Cause between *Thacker* & *Redman* was several times heard by the Lord *Nottingham*, and heard again by the Lord Keeper *North* on the 20th. of *April*, 35 *Car.* 2. after the Decree enroll'd; and upon that hearing, a Tryal at Law directed, which must occasion another hearing.

hended,

bended, for such rehearing his frequent saying, being, that the nimbleness of a Clark in enrolling his Decree should not hinder him from coming at Justice, and that he would leap over Hedge and Ditch to do it; and doubtless it is the true and proper power of that Court of Equity so to do: And though it doth of discretion entertain some Forms, yet it may, and ought upon occasion to leave them, rather then tie up its own hands from doing Justice; for it hath *Potestatem absolutam secundum probata Judicare*; 9 E. 4. f. 15. and if ever any Chancellor did amiss in that respect, it was in that he would leap lustily for some, but would not hop over a straw for others: I wish none in that great place be ever more guilty of the like partiality.

It appears from what is beforementioned, that the Court of Equity in Chancery is the King's high Court of conscience for moderating the rigor, and supplying the defects of the Com-

Common-Law, and he may order it, and limit the Juriſdiction thereof as to him ſeems moſt agreeable to Equity and Juſtice; a further inſtance whereof appears by an Enrollment of a Commiſſion now to be ſeen in Chancery, beginning thus:

At the *Rolls*, 6 pars 14 *Jac.* nu. 25.

JAMES *by the Grace of God*, &c. wherein it is mentioned, *That the Attorney-General and the reſt of the Kings Councel learned in the Law had been commanded to conſider and certifie to the King if the Chancery might relieve according to Equity after a Judgment at Law*; and therein is mentioned the conſultation had by the Kings Councel thereupon, and their reaſons on the point, and the Roll ends thus: *We in Our Princely judgment having well weigh'd, & with mature deliberation conſidered of the ſaid ſeveral Reports of Our learned Counceel, and all the parts of them*, &c.

Do

De will and command, That Our Chancellor or Keeper of the Great Seal for the time being, ſhall not hereafter deſiſt to give to Our Subjects, upon their ſeveral complaints now and hereafter to be made, ſuch relief in Equity, notwithſtanding any former proceeding at the Common-Law againſt them, as ſhall ſtand with the true merits and Juſtice of their caſes, &c. And for that it appertains to Our Princely care and Office only to be Judge over all Our Judges, and to diſcern and determine ſuch differences as at any time may or ſhall ariſe between Our ſeveral Courts touching their Juriſdiction, and the ſame to ſet and to decide as We in Our Princely Wiſdom ſhall find to ſtand moſt with Our Honour, and the example of Our Royal Progenitors in the beſt of times, and the general Weal and Good of Our People, for which We are to anſwer to God, who hath placed Us over them. Our will and pleaſure is, That Our whole Proceedings herein, by the Orders formerly

formerly ſet down, be enroll'd in Our Court of Chancery, *there to remain of Record, for the better extinguiſhment of the like Queſtion that may ariſe in future times.* Decimo octavo Julii, Anno Regni Regis *Jacobi* quarto. decimo, per ipſum Regem.

But after all I have ſaid, if there be any that have conſidered the premiſſes, and will ſtill deny the Kings Power, I muſt alſo ſay, That for determination of the matter, the opinion of his Majeſties learned Judges is to be the Touch-ſtone; therefore, for a further inducement to enquire further of them touching this matter, which is my principal aim hereby, I ſhall in the next place give a hint of the inconveniences that do happen for want of this courſe of Proceeding.

SECT.

SECT. VII.

The Inconveniencies that accrew for want of a constant Relief against Erreneous and Unjust Decrees in Chancery.

TO apprehend the mischiefs that may ensue for want of a constant and permanent practical Power to controll and rectify mistaken Decrees in *Chancery*, it is a necessary to look back to the fourth *Section* for the Power of that Court, and how far it extends, which is there set down in some measure.

It is also considerable, how ill some Chancellors have us'd this their so great unlimited Power, which appears in the Lord *Bacon*'s Case, herein also before re-cited in the fifth *Section*; for it is not Impossible but that some of his Successors may do the like, which if but any one should,

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it would be very hard for many a poor Creature to wait the Convention of a Parliament, especially if it should happen that another usurping part of a Parliament like that about 41. should attempt to play the old Game again; so that in such case, the King must perhaps either leave many of his Subjects utterly undefended against the corrupt and vicious proceedings of another *Bacon*, or endanger his own safety, by letting them sit; in which case, by the Rule of Self-preservation, the King ought to save himself: But setting aside this matter of corruption, as if no such would ever hereafter be in the World, if we consider humane frailty, and the real mistakes every single man may be subject to; especially when beset with the mercenary Arguments of three or four Hireling Advocates of a side, who think themselves oblig'd, when opportunity serves, to mistake for their Clients, according to the measure of the Fees they receive,

ceive, as I have known ſome of them knowingly do; and ſometimes they prevaricate and omit what they ought to ſay, if either Feed on both ſides, or not high enough Feed of the ſide they are of; by means whereof a circumſpect Lord Chancellor or Keeper may innocently be ſeduc'd to make an ill Decree, and by force thereof a poor man muſt either go to Priſon, or part with the beſt part of his Subſtance, ſo that by both ways, himſelf and Family are brought unjuſtly to want and miſery; and if he be a Trades-man, it is ods but he breaks one or two more, for Trades-men are like Nine-pins, one ſeldom falls alone; and if a Parliament when it meets ſhould find leaſure from publick buſineſs to examine the matter, and ſhould ſee cauſe to alter the Decree, and Award Reſtitution, the man that got the Money by means of the ill Decree, may have ſpent it all, gone beyond Sea, or dead, without Aſſets, or

twenty

twenty such Chances may happen, that the Money may never be got again by any Art or Industry whatsoever, which would be prevented if there were a place to Appeal, before performance of the ill Decree; and moreover, it remains a doubtful case as to the many Decrees of the late Lord Chancellor *Notingham* Revers'd by the now Lord Keeper *North*, which of the two Lords are in the right, he that made the Decrees, or he that Revers'd them, it being not fairly to be decided, but by the Advice and Opinion of a greater number of as Wise and Judicious men as themselves, and that is a fair and reasonable way of determining it, for *vis unita fortior*; but the greatest inconvenience of all, is that which concerns the Government; for while this opinion stands, That the King cannot hear the matter in Person, nor refer it to others, though to some of the self same Lords that sit in Parliament; but that the matter

must

must wait their meeting in a Parliamentary way, it may make the people believe that the Supremacy of Jurisdiction is in the House of Lords, and not in the King, and consequently lessen him in their opinion; for People Love and Honour them most from whom they find most Relief against Injury; and how consistent that is with Monarchy, and how agreeable it is with our Oaths willingly to suffer, let any man Judge that hath Sense and Loyalty. Since all the Courts of *Westminster* have four Judges in each Court, men Learned in the Laws, of known and visible Integrity, and all Sworn, *To do equal right to all, and to take no Fee or Roabes of any man great or small, but of the King himself, during their being Judges*; And who in their proceedings are ty'd to Rules; and since Appeals by Writ of Error, by special Provision by Act of Parliament,

18 E. 3. 7. Oath of Just.

ment may be at all times had againſt their Judgments; and ſince there are frequent Appeals from all Eccleſiaſtical Courts, and from the Court of Admirality out of Parliament. It is a mighty miſtery to me, and the policy of it is not Intelligible, that any man ſhould labour to prop up this Opinion, that there ſhould be no Appeal but to Parliament from this Court of Equity in *Chancery*, where there is now but one Judge, and his Orders and Decrees controuling all the Judgments of other Courts, and he therein ty'd to no other Rule but his own Conſcience, be it good or bad: I think a Chancellor or Keeper for his own Juſtification, ſhould not be againſt the Kings Examining his Decrees, or Referring them to fit perſons to be Examin'd and Corrected, which without peradventure is not only the beſt and ſureſt way for Adminiſtration of Juſtice in this Caſe, and ſo far from ſetting up an Arbitrary way, or an Extraordinary

ry Course, that it is but restoring the Court of Equity in *Chancery* to its Ancient and Primitive form of Judicature, the definitive Judging there by the Chancellor alone being but an Innovation upon the Original Institution of that Court, as appears by what is aforesaid, and to the end there may be no obstruction in the way, I have enquir'd how far the King ought by Law to provide for his Injur'd Subjects, in case of Appeal to him from Erroneous or Unjust Decrees in *Chancery* by a Lord Chancellor or Keeper.

SECT. VIII.

Whether the King ought ex debito Justiciæ *to hear in Person, or to grant References upon Complaint to him made against Erroneous and Unjust Decrees in* Chancery.

I Have as great Veneration for Kingly Government, and am as

Firm and Faithful to it as any man can be; however I think it no presumption to affirm, that the King ought to do his Subjects right, by using the best means he may for administration of Justice amongst them, *pertinet ad Regem ad quamlibit injuriam compescendam competens remedium adhibere.* It is no dishnour to him that he is oblig'd to it, for it is for that end he is ordain'd by God and obey'd by men, it is therein consists the height of his Glory and the lustre of his Majesty, and says *Fleta, Whereas it is so ordain'd that every man in prosecution of his right,* Potius judicio quam viribus utatur, *Should make use of the Law rather than force:* The injur'd are to come to the King, and having shew'd him the wrong they have suffer'd, he ought to do speedy Justice to his Petitioners; yet the King is not to be troubled, but when his Ordinary Judges fail of their Duty: For, *Nemo*

Fleta fo. 17. par. 15.

in

in lite Regem appellato niſi quando domi jus conſequi non poterit. Orig. Jul. fo. 20.

A Complaint to the King by Petition againſt the Error and Injuſtice of a *Chancery* Decree, is an Appeal to the King from his Chancellor, from the Inferior Judge to the Superior, which is very natural; and a Petition to him for allowance of a Writ of Error, to the Houſe of Lords to inſpect and certifie a Judgment of the Court of *Kings-Bench*, or *Exchequer Chamber*; and an Appeal to the King from his Eccleſiaſtical Courts, and from the Court of Admirality, are all grounded upon the ſame natural Juſtice; and by reaſon of the Kings Supremacy of Juriſdiction, and that as well by force of the Common as Statute Law.

Of Appeals in general, Sir *Edw. Cooke* cites the Opinion of a Learned Judge of the Admirality, and ſome others to this effect, *For as much as an Appeal is a natural defence, it can-*

cannot be taken away by any Prince or Power; but if the Appeal be just and lawful, the Superior Judge ought of right and Equity to receive and admit the same, as he ought to do Justice to the Subject; and so if the Cause of the Appeal be just and Lawful, he ought to Reverse and Revoke all mean Acts done after the Appeal brought in prejudice of the Appeallant:

Cook's 4 Inst. fo. 340.

But I need not much labour that point, for I can Experimentally say, that His Majesty is very desirous that His Subjects should have the full and free benefit of the course of Justice, and if any ever fail of it, it ought not to be imputed to the King, but to his Council, whose advice is the Kings guide; and if they mis-advise the King, and he follows their advice, he is excusable; yet he is not bound always to follow their advice, if he be really satisfied in himself after hearing their reasons, that it ought to be otherwise than they advise; for

as

as he is plac'd by God above them, it is to be presum'd God may supply him with a more discerning Spirit than they, and enable him to distinguish between the best and worst advice, having heard the reasons of both: Yet they that knowingly advise the King ill, or neglect to advise him well, when occasion requires, are to blame; therefore I hope His Majesties Privy Council will consider of this matter, and advise and desire His Majesty to take the Advice and Opinion of His Judges, who are His proper Councel therein: For in my poor judgment, and as I have heard from most Judicious men, the restoring this kind of proceeding aforemention'd for Relief against unjust Decrees in *Chancery*, and other Courts of Equity, will be as much for the Kings Honour and His Subjects Good, as any other part of his Jurisdiction: For I say again, there is no Robbery, Piracy, Burglary, or other Villany whatsoever, so mischievous

and

and insupportable, as the unjust taking away of a mans Estate by colour of doing Justice, and therefore most worthy of His Majesties care to prevent. *Cum Index indulgeat indigno nonne ad prolaptionis contagium provocat universos*, Bract, 107.

I expect to be Censur'd by some for what is here set down, though I challenge all mankind to charge me with any misrecital or false quotation; but that which most troubles me, is my consciousness of my own unability to perform the matter, least a good Cause should suffer by ill management: However, having done my best, I hope it will be taken in good part by all Honest men; more I cannot do, less I durst not for my Oaths sake; and if any be offended with me, this shall be my Sanctuary,

Fiat Justicia si ruat Cœlum.

FINIS.